(14)

No. 92-1964-CFX
Status: GRANTED

Title: National Labor Relations Board, Petitioner
v.
Health Care & Retirement Corporation of America

Docketed:
June 8, 1993

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Cooper,Cary R., Wells,Ruby

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 8 1993 | G | Petition for writ of certiorari filed. |
| 2 | Jul 8 1993 | | Brief of respondent Health Care & Retirement Corporation of America in opposition filed. |
| 3 | Jul 14 1993 | | DISTRIBUTED. September 27, 1993 |
| 4 | Jul 23 1993 | X | Reply brief of petitioner filed. |
| 5 | Oct 4 1993 | | Petition GRANTED. limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m.,Wednesday,January 5, 1994. Rule 29 does not apply. ********** |
| 6 | Nov 15 1993 | | Brief of petitioner National Labor Relations Board filed. |
| 7 | Nov 15 1993 | | Joint appendix filed. |
| 8 | Nov 16 1993 | | Brief amicus curiae of American Nurses Association filed. |
| 9 | Nov 16 1993 | | Brief amicus curiae of AFL-CIO filed. |
| 10 | Nov 19 1993 | | Record filed. |
| | | * | Original proceedings National Labor Relations Board. (BOX) |
| 11 | Nov 19 1993 | | Record filed. |
| | | * | Partial proceedings United States Court of Appeals for the Sixth Circuit. |
| 13 | Dec 13 1993 | | Brief amicus curiae of American Health Care Association filed. |
| 12 | Dec 14 1993 | | Brief of respondent Health Care & Retirement Corporation of America filed. |
| 14 | Dec 14 1993 | | Brief amicus curiae of Council on Labor Law Equality filed. |
| 15 | Dec 15 1993 | G | Motion of U. S. Home Care Corporation of Hartsdale, New York, for leave to file a brief as amicus curiae filed. |
| 16 | Dec 29 1993 | | SET FOR ARGUMENT TUESDAY FEBRUARY 22, 1994.(2ND CASE). |
| 17 | Jan 5 1994 | | Reply brief of petitioner filed. |
| 19 | Jan 7 1994 | | CIRCULATED. |
| 18 | Jan 10 1994 | | Motion of U. S. Home Care Corporation of Hartsdale, New York, for leave to file a brief as amicus curiae GRANTED. |
| 20 | Feb 22 1994 | | ARGUED. |



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the Act's protections as a supervisor to bear the burden of proving the individual's supervisory status.

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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-11a, is reported at 987 F.2d 1256. The decision and order of the National Labor Relations Board and the decision of the administrative law judge, App., *infra*, 12a-76a, are reported at 306 N.L.R.B. No. 11.

## JURISDICTION

The judgment of the court of appeals was entered on March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor * * *.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(12) of the Act, 29 U.S.C. 152(12), provides in relevant part:

> The term "professional employee" means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes * * *.



## STATEMENT

This case involves the determination of the National Labor Relations Board (Board) that the nurses employed by respondent are not supervisors, who are excluded from the protections that the Act affords to employees; the Board thus held that respondent violated the Act by disciplining and discharging certain nurses for engaging in concerted activity protected by the Act. The court of appeals vacated the Board's order, holding that the Board's test for determining when a nurse occupies supervisory status, as well as the Board's allocation of the burden of proof on that issue to the party asserting supervisory status, conflict with the Act.

1. Respondent owns and operates approximately 138 nursing homes in 27 States. App., *infra*, 32a-33a. This case involves the Heartland nursing home in Urbana, Ohio (Heartland). *Id.* at 33a. Heartland has an administrator and several departments. The nursing department includes a director of nursing (DON) and an assistant director of nursing (ADON), both of whom are supervisors. It also includes 9 to 11 staff nurses and 50 to 55 nurses' aides. Some of the staff nurses are registered nurses, while others are licensed practical nurses, but all have essentially the same duties. *Id.* at 34a-35a & n.5.

Heartland is a 100-bed facility, divided into two wings. App., *infra*, 34a. One staff nurse is always on duty in each wing, *id.* at 35a; the nurses work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. or vice

versa. *Id.* at 37a. The nurses' aides work eight-hour shifts, beginning at 7:00 a.m., 3:00 p.m., and 11:00 p.m. *Ibid.* There are six aides in each wing during the first shift, four in each wing during the second shift, and two in each wing (plus a fifth aide who spends half the shift in each wing) on the third shift. *Ibid.* The administrator, the DON, and the ADON work only during the day and on weekdays, *id.* at 46a, but the administrator and the DON are always on call, and nurses call them when non-routine matters arise. *Id.* at 47a.

The duties of the aides off of the resident wings are assigned by Heartland's administrators. On the wings, the day-shift nurses tell each aide which residents are to be cared for by that aide. In making such assignments, the nurses follow old patterns that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. The night-shift nurses arrive four hours after the evening-shift aides have begun work, and they do not change the aides' assignments. App., *infra*, 38a-39a. After aides are assigned to patients, nurses have little role in directing the performance of their duties. *Id.* at 40a. Each of the aides can do the work of any other aide. *Id.* at 38a.

If one wing is understaffed due to the absence of one or more aides, the nurse on that wing may ask the nurse on the other wing to transfer an aide. The aides are usually allowed to decide which of them will change wings. App., *infra*, 37a-38a. A nurse may also obtain a replacement aide by telephoning the aides until locating one who is willing to come in; the nurse has no authority to order an off-duty aide to report to work. *Id.* at 41a. Alternatively, the



nurse may see if an aide wishes to remain on duty after the end of the aide's shift on overtime, but the nurse cannot insist that any aide do so. *Ibid.* The nurses otherwise have no authority to grant overtime. Nor may the nurses allow an aide to be absent for personal reasons. *Id.* at 42a. Nurses initial time cards showing an aide's overtime or late arrival and routinely report problems, such as absences, to Heartland's administrator or DON. *Id.* at 42a, 44a.

In case of misconduct or poor job performance by an aide, a nurse fills out an "employee counseling form" and delivers it to the administrator or the DON. App., *infra*, 43a-44a. Such forms remain in the aides' personnel files, but have never resulted in disciplinary action being taken against an aide. The nurses never discipline the aides or threaten to do so, and they seldom recommend that an aide be disciplined. *Id.* at 44a-45a.

Heartland gives each employee a performance appraisal after the employee's probationary period and annually thereafter. Initially, the nurses did not participate at all in the evaluation process. Beginning about one month before respondent's actions at issue here, however, the nurses began to fill out parts of the evaluation forms for some aides, rating the aides in several categories. The nurses were specifically told not to give any aide an overall rating or to make a recommendation with respect to continued employment. The nurses deliver the forms to their superiors and do not participate in the separate meetings between each aide and the administrator or DON, at which the evaluations are discussed. There is nothing to indicate that the nurses' role in the evaluation process has any impact on the aides' jobs. The aides'

pay levels depend on seniority, and Heartland does not promote them. App., *infra*, 43a, 45a-46a.

2. The Board's General Counsel issued a complaint alleging that respondent violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by issuing disciplinary warnings to several staff nurses, and later discharging three of them, for engaging in concerted activity designed to improve their working conditions and those of other employees.[1] Respondent contended that its actions with respect to the nurses were taken for legitimate reasons, and, in any event, the nurses were "supervisors" under Section 2(11) of the Act, 29 U.S.C. 152(11), and were therefore not entitled to the protections of the Act. App., *infra*, 33a.

a. The administrative law judge (ALJ) determined that Heartland's nurses are not "supervisors" within the meaning of Section 2(11) of the Act. App., *infra*, 33a-49a. The ALJ acknowledged that the nurses have some authority over and responsibilities regarding the nurses' aides, *id.* at 37a, but he concluded that those responsibilities do not make them statutory supervisors. He noted that the day-shift, but not the night-shift, nurses are involved in assigning the aides to care for residents, *id.* at 38a-39a, but found that the nurses' responsibilities in that regard did not require the use of "independent judgment" as that phrase is used in Section 2(11). App., *infra*, 39a-40a. The ALJ further concluded that the nurses'

[1] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. 158(a)(1). Section 7 of the Act, 29 U.S.C. 157, grants employees the right, *inter alia*, to engage in "concerted activities for the purpose of * * * mutual aid or protection."



direction of the work of the aides does not amount to "responsibly * * * direct[ing]" the aides "in the interest of the employer," since "the nurses' focus is on the well-being of the residents rather than of the employer." *Id.* at 40a. "[T]he direction the nurses give to the aides," he added, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" *Ibid.*

The ALJ also found that the nurses have no authority to require aides to work overtime or to request aides to work overtime because of the press of work. They can only offer overtime assignments to aides who are off duty (or scheduled to go off duty) in order to fill in for absent colleagues. Similarly, the nurses' authority to allow aides to leave early is limited to instances of sickness. App., *infra*, 41a-43a.

The ALJ further concluded that the nurses have no role in rewarding or promoting aides because the aides' pay level is not tied to performance, but "depends solely on their seniority." App., *infra*, 43a. He also found that the nurses have no real role in disciplining or discharging aides because the nurses' criticism of aides' performance does not affect their job status. Although the nurses report problems about an aide's work to the administrator or DON and may sit in on disciplinary conferences, the nurses do not themselves penalize, threaten to penalize, or (with minor exceptions) recommend penalties for the aides. *Id.* at 43a-45a.

The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. App., *infra*, 46a. He noted, however, that the administrator and the DON are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.*

at 47a. The ALJ further examined the ratio of supervisors to employees (depending on whether the nurses are considered supervisors or not), *id.* at 47a-48a, but concluded that specific ratios are not dictated by the Act, and that, "analyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11), the nurses simply do not possess supervisory authority."[2] *Id.* at 48a.

b. The Board affirmed the ALJ's determination that the nurses are employees, not statutory supervisors. App., *infra*, 13a n.1. The Board clarified, however, that the ALJ had erred in his assumption, *id.* at 44a & n.7, that the General Counsel had the burden of proving that the nurses are not supervisors. The Board stated that "[t]he party alleging supervisory status * * * bears the burden of proving an individual is a supervisor." *Id.* at 13a n.1. With respect to that issue, the Board indicated that it continued to disagree with the Sixth Circuit's statement in *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (1987), that "[t]he Board always has the burden of coming forward with evidence showing that employees are not supervisors * * *." App., *infra*, 13a n.1, citing *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390 (1989). The Board added that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees."[3] App., *infra*, 13a n.1.

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[2] The ALJ went on to find that respondent's issuance of certain disciplinary warnings violated the Act, but that respondents had not violated the Act by issuing other disciplinary warnings and by discharging three nurses for engaging in protected activity. App., *infra*, 49a-72a.

[3] The Board went on to reverse the ALJ's holdings (see note 2, *supra*) that respondent had not violated the Act with respect to the disciplinary actions and discharges of the nurses at issue. App., *infra*, 17a-27a. Those determinations of the Board are not at issue here.



3. Respondent filed a petition for review, and the court of appeals vacated the Board's order. App., *infra*, 1a-11a. With respect to the Board's test for determining whether nurses are supervisors, the court of appeals observed that "there is a history of conflict" between the Board's approach and decisions of the Sixth Circuit.

> The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act.

*Id.* at 8a. The court noted, however, that in *NLRB* v. *Beacon Light Christian Nursing Home, supra*, and *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992), it had held that "if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in 'mere patient care.'" App., *infra*, 8a. The court also noted that it has rejected the Board's view that the burden to establish that an individual is a supervisor rests on the party who asserts it, *id.* at 6a, 8a; instead, the court places the burden on the Board to establish "non-supervisory status." *Id.* at 10a.

Having rejected the Board's legal determinations, the court of appeals held that "the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing

the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present." App., *infra*, 10a. The court thus concluded that the staff nurses had the authority to "assign" and "responsibly direct" aides within the meaning of Section 2(11) of the Act. App., *infra*, 9a-10a. Because of its finding that the nurses are statutory supervisors, the court of appeals vacated the Board's order without reaching the issue of whether respondent committed unfair labor practices. *Id.* at 11a.

**REASONS FOR GRANTING THE PETITION**

The Board has long held that a nurse's direction to less-skilled employees, in the exercise of professional judgment and incidental to the nurse's treatment of patients, is not, by itself, sufficient to make the nurse a "supervisor" within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11). Further, the Board has prescribed, as a procedural matter, that the party alleging that an individual is a supervisor, and consequently excluded from the protections of the Act, bears the burden of proving that claim. For the third time, the court of appeals has rejected the Board's position on these issues, thereby deepening a split in the circuits on the test for determining the supervisory status of nurses and the allocation of the burden of proof on the issue of supervisory status (whether of nurses or of other employees). Both questions are recurring ones that are important to the proper administration of the Act. In order to resolve the double conflict presented by the decision in this case, and to reaffirm that judicial deference is owed to the Board's interpretations of the Act where, as here, its positions are rational and consistent with the statute, this Court's review is warranted.



1. a. Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and hence from the Act's protections, any "supervisor." "Supervisor" is defined in Section 2(11), 29 U.S.C. 152(11), as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

By its terms, that definition calls for line-drawing by the Board, because the Board must determine what constitutes action "in the interest of the employer" and what activities should be classified as mere routine, rather than the exercise of "independent judgment."

Moreover, the Act also covers professional employees, a category that, as defined in Section 2(12), 29 U.S.C. 152(12), covers employees who have duties requiring the "consistent exercise of discretion and judgment." Because most professionals have some supervisory responsibilities in the sense of directing another's work, the Board must distinguish between supervision in the statutory sense and work direction by a professional employee that is merely an exercise of the customary duties of that person's profession. The failure to draw such a distinction would negate Congress's intention to afford the protection of the Act to professional employees.

In light of the interplay of the Act's definitions and its policies with respect to the exclusion of supervisors and managers from employee status, the Board has held that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty[;] [o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 690 (1980) (footnote omitted). In *Yeshiva*, the Court referred to the Board's application of those principles in a variety of contexts, including cases in the health care field, and concluded that those "decisions accurately capture the intent of Congress."[4] *Ibid.*

The Board has long applied those principles in the health care field.[5] For example, in *Doctors' Hospital*

[4] The Court cited the Board's decisions holding that architects and engineers functioning as project captains for work performed by teams of professionals are employees, despite their planning responsibility and authority to direct and evaluate team members, as well as the Board's decision in *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), see pp. 12-13, *infra*, which involved nurses. *Yeshiva*, 444 U.S. at 690 n.30.

[5] The Board first asserted jurisdiction over private proprietary hospitals and nursing homes in 1967. *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (overruling *Flatbush General Hospital*, 126 N.L.R.B. 144 (1960)); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967). The National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, extended the Board's jurisdiction to the employees of non-profit health care facilities. See *American*



*of Modesto, Inc.*, 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), the Board found that a hospital's registered nurses were not supervisors although they directed other, less-skilled employees with respect to the work to be performed for patients and saw that such work was done. The Board explained that the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their Employer." 183 N.L.R.B. at 951. The Board distinguished *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969), in which it had found the same employer's floor nurses to be supervisors, "because, *in addition to* performing their professional duties and responsibilities, [the floor nurses] also possessed the authority to make effective recommendations which affected the job status and pay of the employees working on their wings."[6] 183 N.L.R.B. at 951-952.

*Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545 (1991). In the Board's rulemaking on appropriate bargaining units in acute care hospitals, which this Court upheld in *American Hospital Ass'n, supra*, the Board determined that one appropriate bargaining unit would be a unit consisting of "[a]ll registered nurses." 29 C.F.R. 103.30(a)(1).

[6] The Board applies its approach to determining supervisory status both to registered nurses (who are "professional" employees) and to licensed practical nurses (who are "technical" employees). Licensed practical nurses may not be included in the same bargaining unit with registered nurses absent the latter's consent, see *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1267 (1975); but the Board treats licensed practical nurses in the same way as it treats registered nurses for the purpose of determining supervisory status where, as here, see p. 3, *supra*, they have the same duties as

In enacting the National Labor Relations Act Amendments of 1974, see note 5, *supra*, Congress indicated its approval of the Board's approach to determining supervisory status. In bringing private nonprofit hospitals under the Act, both the Senate and House Committees rejected an amendment that would have excluded health care professionals from the definition of supervisor in Section 2(11) on the ground that it was unnecessary in light "of existing Board decisions."

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same). Each Committee added that it "expects the Board to continue evaluating the facts of each case in this manner when making its determinations." *Ibid.*

This Court has noted that "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, *supra*, at 6. The Board has consistently followed that approach in determining the

registered nurses. See *Passavant Health Center*, 284 N.L.R.B. 887, 892 (1987).



supervisory status of health care professionals, such as nurses.[7]

b. The Board's rule—that a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised "in the interest of the employer" within the meaning of Section 2(11) of the Act—is "rational and consistent" with the statute; accordingly, it is "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990).[8] In refusing to defer to the Board's approach to determining supervisory status, and instead imposing

[7] See, *e.g.*, *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1268 (1975) (registered nurses who serve as charge nurses and as team leaders are not statutory supervisors because "their duties are generally limited to giving directions in the performance of their professional duties"); *Wing Memorial Hospital Ass'n*, 217 N.L.R.B. 1015, 1016-1017 (1975) (registered nurse, who "controls" operating room, recovery room, and central supply room, is a statutory supervisor because she evaluates, schedules, and transfers employees, and makes effective recommendations about job applicants after interviewing them); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976) (head nurses and their assistants not statutory supervisors, since they "perform duties and functions predominantly in the 'exercise of professional judgment' incidental to their treatment of patients" and do not have "the authority to make effective recommendations with respect to the hiring, firing, transfer, or discipline of subordinates").

[8] As this Court has noted, the Board has "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961).

its own approach on the Board, the court of appeals erred.

The court of appeals has asserted that nurses necessarily act "in the interest of the employer" when they direct their subordinates' delivery of health care, because it is "self-evidently in the best interest of the employer to try to do a superior job of serving the needs and interests of the employer's customers." *Beverly California Corp.* v. *NLRB*, 970 F.2d at 1553; *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1079; see App., *infra*, 8a-9a (relying on those cases). The Board's rule, however, does not imply that the interest of a nurse in serving the needs of patients conflicts with the employer's business goals. *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 395 (1989). Rather, the Board's rule recognizes that if coincidence of interests so defined were the only factor considered, it would swallow up the Act's coverage of professional employees, for "most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on."[9] Accordingly, the Board has drawn a reasonable distinction between a nurse's direction of aides that is incidental to the delivery of patient care, and the nurse's possession of authority over personnel, such as the authority to affect the job status or pay of aides. Only in the latter case is the nurse acting "in the interest of the employer" as that phrase is used in Section 2(11). *Ohio Masonic Home, Inc.*, 295 N.L.R.B. at 395, citing *Beverly Manor Convalescent Centers*, 275 N.L.R.B. 943, 947 (1985).

[9] *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).



If the court of appeals had not substituted its construction of the Act for the Board's, the court would have sustained the Board's conclusion that the nurses at issue are not supervisors. The factual findings of the ALJ, adopted by the Board, establish that the nurses' assignment and direction of the aides is incidental to the nurses' delivery of patient care; the nurses possess no authority to affect the job status or pay of the aides. See pp. 3-6, *supra*.

c. The Board's approach to determining whether nurses constitute supervisors has been the subject of extensive litigation. Apart from the Sixth Circuit, the courts of appeals that have squarely addressed the issue have endorsed the Board's position that a nurse's direction of an aide's delivery of patient care does not amount to supervisory conduct within the meaning of Section 2(11).

For example, in *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1468 (7th Cir. 1983), the court of appeals upheld the Board's finding that certain licensed practical nurses were not supervisors when, in directing the work of aides, they exercised "a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests." In a subsequent case, the Seventh Circuit acknowledged that the Sixth Circuit's decision in *Beacon Light Christian Nursing Home* is "in considerable but unacknowledged tension with our decisions," because it overlooks the fact that "[s]upervision exercised in accordance with professional rather than business norms is not supervision within the meaning of [Section 2(11)], for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the [employer's] profit-maximizing objectives." *Chil-*

*dren's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989).[10]

Decisions from other circuits have also sustained the Board's approach. In *Misericordia Hospital Medical Center* v. *NLRB*, 623 F.2d 808, 816-817 (2d Cir. 1980), the court upheld the Board's finding that a head nurse was not a supervisor when her "authority was primarily exercised in providing patient care, not in supervising employees on behalf of management"; her directions to other employees were "incidental to her professional duty to treat patients"; and she "lacked real authority to make independent decisions not involving patient welfare." In *NLRB* v. *Walker County Medical Center, Inc.*, 722 F.2d 1535, 1542 (11th Cir. 1984), the court noted that the nurses in question "engaged primarily in direct patient care" and were not supervisors, because they were "not responsible for major personnel decisions, such as hiring, firing, transferring, and disciplining employees." And in *Waverly-Cedar Falls Health Care Center, Inc.* v. *NLRB*, 933 F.2d 626, 630-631 (8th Cir. 1991), the court upheld the Board's nonsupervisory determination, quoting extensively from *Res-Care*.[11] See also *NLRB* v. *St. Francis Hospital of*

[10] Although the Seventh Circuit has "emphasized" to a greater degree than the Board "the ratio of supervisory to nonsupervisory employees under the competing positions of the parties," *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d at 132, that court, in contrast to the Sixth Circuit, has correctly accepted the Board's focus on whether an employee is "acting in accordance with professional norms" in evaluating the issue of supervisory status. *Id.* at 131.

[11] The Third Circuit has recently enforced, by unpublished judgment order, the Board's determination that certain nurses supervising home-care aides are not statutory supervisors,



*Lynwood*, 601 F.2d 404, 420 (9th Cir. 1979).[12]

The Sixth Circuit's repeated rejection of the Board's test for determining whether a nurse is a statutory supervisor prevents uniform administration of the Act on a significant issue of coverage. There is no likelihood that the courts of appeals will reach agreement on this issue absent this Court's intervention.

2. The court of appeals' holding that the Board has the burden of proving that an employee is not a supervisor also raises an important issue in the administration of the Act. Moreover, the court's holding conflicts with the decisions of other courts of appeals which have, both within and outside of the

*Visiting Homemaker & Health Services, Inc.* v. *NLRB*, Nos. 92-3278 & 92-3320 (Feb. 11, 1993), enforcing 307 N.L.R.B. No. 90 (May 13, 1992), and a petition for a writ of certiorari seeking review of that holding is pending in this Court. *Visiting Homemaker & Health Services, Inc.* v. *NLRB*, petition for cert. pending, No. 92-1799 (filed May 11, 1993).

[12] The position of the Fourth Circuit is unclear. In *NLRB* v. *St. Mary's Home, Inc.*, 690 F.2d 1062, 1066-1068 (4th Cir. 1982), the court indicated its approval of the Board's legal test, while finding on the facts of that case that the nurse at issue was a supervisor because her duties were the same as those of another nurse whom the Board had found to be a supervisor. In a recent unpublished decision, however, the Fourth Circuit acknowledged that "other circuits, on similar facts, have found various categories of nurses, including [licensed practical nurses], to be 'employees,'" but concluded that it was bound by *St. Mary's* and rejected the Board's finding that the licensed practical nurses at issue were not supervisors. *Beverly California Corp.* v. *NLRB*, Nos. 92-1068 & 92-1205 (Sept. 11, 1992), denying enforcement to 303 N.L.R.B. No. 20 (May 28, 1991).

health care field, approved the Board's allocation rule.[13]

The Board has ruled that the burden of proof of supervisory status falls "on the party alleging that such status exists." *St. Alphonsus Hospital*, 261 N.L.R.B. 620, 624 (1982), enforced, 703 F.2d 577 (9th Cir. 1983) (Table). The Board's rule applies regardless of which party makes the assertion; thus, an employer must carry the burden when it defends against an unfair-labor-practice complaint by claiming that an individual is a supervisor, see, *e.g.*, *Schnuck Markets, Inc.*, 303 N.L.R.B. 256, 258 (1991), rev'd on other grounds, 961 F.2d 700 (8th Cir. 1992), while the General Counsel must carry that burden when he alleges an individual's supervisory status as part of his case, see, *e.g.*, *Serv-U-Stores, Inc.*, 225 N.L.R.B. 37, 46-47, 50, 58 (1976). The Board applies that rule to the full spectrum of industries subject to the Board's jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977) (collecting cases).

The Board's rule effectuates Congress's intention that the exclusion of supervisors from the coverage of the Act would be a limited one. The original Wagner Act did not distinguish supervisory from non-supervisory personnel; accordingly, the Board permitted supervisory employees, such as foremen, to join labor organizations, and required employers to

[13] The allocation of the burden of proof is not determinative in this case, as the Board found that "the preponderance of the evidence establishes that the nurses are employees." App., *infra*, 13a n.1. Nevertheless, review of this issue is warranted because it has divided the circuits and because the Sixth Circuit has indicated that its position will govern future cases reviewed in that circuit.



bargain with their collective bargaining representatives. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). By amending the Wagner Act in 1947 to exclude supervisors,[14] Congress placed outside the protection of the Act a category of employees formerly covered by it. In doing so, the Senate Labor Committee observed that, "[i]n framing th[e] definition [of "supervisor"] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). The supervisor exclusion was intended to apply only to "the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." *Id.* at 4. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974). Because the determination that an individual is a supervisor means that that person loses his organizational and other rights under the Act, the Board places upon the party seeking to invoke that exclusion the burden of proving that the exclusion applies.

Other courts of appeals have approved the Board's method of allocating the burden of proof of supervisory status, both in health care and non-health care contexts. See *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); cf. *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 132 (7th Cir. 1989) (noting that the "burden of persuasion" is on the employer respecting proof of the ratio that would exist between supervisory and

[14] See Labor-Management Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138.

non-supervisory personnel if the nurses in that case were supervisors). See also *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983) (upholding Board allocations of burdens of proof in another context). By invariably placing the burden of proving supervisory status on the Board, the decision of the Sixth Circuit conflicts with these decisions and, accordingly, warrants further review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1993

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Nos. 92-5291/5469

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA, PETITIONER/CROSS-RESPONDENT

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT/CROSS-PETITIONER

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ON PETITION FOR REVIEW AND ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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Decided and Filed March 10, 1993

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Before: JONES, and SILER, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

ANTHONY J. CELEBREZZE, Senior Circuit Judge. Petitioner and Cross-Respondent, Health Care & Retirement Corporation of America, hereinafter referred to as either "petitioner" or "HCR", timely filed a petition to review the Order of the

National Labor Relations Board, ("the Board"), dated March 3, 1992. Respondent and Cross-Petitioner, the National Labor Relations Board, hereinafter referred to as either "General Counsel" or "respondent", filed a cross-petition for enforcement of the Board's Order.

I.

Petitioner operates a nursing home facility in Urbana, Ohio. In April, 1989, one of the facility's employees, Ruby Wells, filed a charge with the NLRB claiming three HCR employees, including herself, had been discharged for participating in activities protected by the National Labor Relations Act. The charge also alleged that she and two other employees received warnings from the nursing home for their participation in protected activities. On May 25, 1989, the Board issued a complaint alleging respondent had committed an unfair labor practice as defined by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act"). Specifically, the complaint accused HCR of disciplining certain employees who were licensed practical nurses (LPNs) and that the employees were being disciplined for engaging in concerted protected conduct for the purpose of collective bargaining and other mutual aid and protection in violation of Section 8(a)(1) of the Act.

A hearing was held before an Administrative Law Judge ("ALJ") during which both sides presented evidence. HCR contended that the nurses were not protected by the Act because they were supervisors. The General Counsel conceded that if the nurses were found to be supervisors, then they were not to be given protected status. Moreover, HCR maintained that it acted against the nurses for entirely appropriate, lawful, reasons.



The ALJ initially found the nurses to be "employees" within the meaning of the Act and, therefore, cloaked with the protections provided for by the Act. Nevertheless, the ALJ held that HCR had not committed an unfair labor practice by discharging employees for engaging in allegedly protected activities. Rather, the ALJ found the discharges were based on justifiable considerations. Furthermore, the ALJ determined that HCR had not, except in one instance, improperly issued written warnings.

The General Counsel filed exceptions to the decision of the ALJ disputing the lack of a finding of unfair labor practices. HCR filed cross-exceptions challenging the ALJ's determination that the nurses were employees and not supervisors within the meaning of § 2(11) of the Act. On January 21, 1992, the Board issued its Decision and Order. Regrettably, the Board's Order barely addressed HCR's cross-exceptions, upholding the ALJ's determination the nurses were employees and not supervisors, merely referring to it in a footnote. The Board, upon review, however, concluded that the ALJ had incorrectly determined that HCR did not commit an unfair labor practice. Instead the [B]oard found that HCR had, in fact, discriminated against the employees for engaging in concerted protected activity in violation of § 8(a)(1) of the Act. The Board ordered HCR to cease and desist from engaging in unfair labor practices and to reinstate the nurses with back pay.

We now have before us HCR's petition to review the Board's decision. The Board has also filed a cross-petition to enforce the Board's order.

II.

HCR's nursing home in Urbana, Ohio, known as Heartland of Urbana, contains 100 beds and provides skilled long-term care for its residents. Heartland employs approximately 100 people. The Nursing Department is staffed by a Director of Nursing ("DON") and an Assistant Director of Nursing ("ADON"), thirteen to fifteen registered nurses and LPNs (known as staff nurses), and fifty to fifty-five aides. The nursing home is physically divided into two fifty-unit wings. During the day, each wing is staffed with one nurse and six aides. During the evening shift, there are one nurse and four aides per wing, and at night there is one nurse per wing and four or five aides on duty for the entire facility. The aides report directly to the staff nurse on duty. There is also a treatment nurse and a patient assessment nurse, whose duties, along with the DON and the ADON, are performed during normal business hours.

During late 1988, and continuing into 1989, the atmosphere at Heartland deteriorated. There was animosity among the employees and morale was low. This manifested itself in a series of disputes between management and employees. Three of the LPNs requested a meeting with Brenda Stabile, the nursing home Administrator, to discuss their plight. Ms. Stabile refused to meet with them at that time, asserting that she was too busy. She did, however, instruct them to make an appointment for later in the week. Rejecting this approach, the nurses drove to Toledo, Ohio with a mission of meeting with Jim Millspaugh, HCR's Director of Human Resources, and Bob Possanza, HCR's Vice-President of Operations. The two men met with the nurses and during



the discourse, Millspaugh agreed to investigate their complaints.

Millspaugh did indeed conduct an investigation, the results of which led to the hiring of more aides, increasing the wages aides were paid, the disciplining of four nurses and ultimately terminating three nurses.[1] HCR maintains the nurses who were disciplined, were disciplined because of their uncooperative attitude and not because of their participation in allegedly protected acivities.

III.

Petitioner contends on appeal that both the ALJ and the Board erred by not finding the staff nurses to be supervisors, as defined by the Act, hence outside the scope of the Act's protection. On appeal, both parties acknowledged, as they did in the proceedings below, that should the staff nurses' positions be determined to be "supervisory" within the meaning of the Act, then the nurses are not protected by the provisions of the Act.

The ALJ properly recognized that the issue of whether the nurses were supervisors or employees must first be resolved before the merits of the unfair labor practice charges could be addressed. He addressed the matter extensively, concluding as follows:

> It is clear that in common parlance Heartland's nurses are "supervisors." They give orders (of certain kinds) to the aides, and they follow those orders. In a manner of speaking,

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[1] One of the nurses who was disciplined had not gone on the trip to Toledo. Her employment was not, however, terminated. Only one of the nurses who traveled to Toledo was not disciplined in any way.

certainly, the nurse on duty is in charge of a wing of the facility.

But Section 2(11)'s definition of supervisor is different from Webster's. And as I understand the meaning of that provision, Heartland's nurses were not supervisors during the period under consideration.

Decision of the ALJ, p. 10.

The Board, in reviewing the ALJ's decision, barely addressed this controversy. In a footnote, the Board stated its agreement with the ALJ's finding that the staff nurses were employees within the meaning of the Act. The Board further stated that the burden to prove supervisory status rested with HCR, though it acknowledged that this court has stated that it is the Board and not the employer who must prove employee status. *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (1987). Yet, in spite of this acknowledgement, the Board opined that it, "has not acquiesced on this point." Finally, the Board summarily stated that, in any event, the preponderance of the evidence established the nurses were employees as defined by the Act.

In the case at bar, this court's analysis must be guided by the need for a distinction between supervisor and employee. The exclusion of supervisors from coverage under the Act was considered essential to allow employers to have the undistracted allegiance of employees in key positions. *See Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 806 (1974). By not providing coverage to supervisors, Congress maintained a reasonable balance of power between employers and unions which could potentially arise if supervisors were themselves union members. *Children's Habilitation Center, Inc. v. N.L.R.B.*, 887 F.2d 130, 131 (7th Cir. 1989).



A panel of this court has recently addressed the issue of whether nurses were supervisors or employees for collective bargaining purposes, holding as follows:

> In language that has been unchanged since it was added to the Taft-Hartley Act in 1947, § 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), defines the term "supervisor" thus:
>
> > "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connecion with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

It bears emphasis, perhaps, that "any" individual who meets the statutory tests is a supervisor; there is no exception for supervisors in the health care field. In 1974 the Senate Labor Committee considered recommending enactment of legislation to create such an exception, but the idea was dropped. See S. Rep. No. 93-766, 93rd Cong., 2d Sess. 6 (1974), reprinted in (1974) U.S.Code Cong. & Admin. News 3946, 3951.

> It also bears emphasis that § 2(11) uses the disjunctive "or" in listing the numerous indicia of supervisory status. *NLRB v. Medina County Publication, Inc.*, 735 F.2d 199, 200 (6th Cir. 1984). Any individual who has authority in any *one* of the listed categories is a supervisor, according to the statute, as long as such authority is to be exercised "in the interest of the employer" and as long as its exercise "is not merely of a routine or clerical nature, but requires the use of independent judgment."

*Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992).

It must be noted that there is a history of conflict between the Board and the courts concerning the supervisory status of nurses employed at nursing homes. *Children's Habilitation Center, Inc.*, 887 F.2d at 134. The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act. This position, however, was rejected by this court in *N.L.R.B. v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987). In *Beacon Light*, this court held that if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in "mere patient care." The court in *Beacon Light* further held that the burden of proving employee status for bargaining unit determinations rested with the Board. *Id.* at 1080.



The Board, nevertheless, once more took this position before the Sixth Circuit in *Beverly*. Again, this court rejected a distinction based on whether a nurse's actions were taken in the interest of a patient. The Board, as cross petitioner, is now once again before this court asking not only to uphold its own order, but to overrule *Beacon Light* and its progeny of cases. As we have already noted, the Board is aware of the law in the Sixth Circuit, but has steadfastly failed to apply it in a fashion appropriate with case authority. It is unfortunate that this court must repeatedly remind the Board that it is the courts, and not the Board, who bear the final responsibility for interpreting the law. *Beverly California Corp.*, 970 F.2d at 1555.

Turning to the case *sub judice*, this court must first determine whether the nurses are indeed supervisors. The *Beacon Light* court established the standard of review to be applied in determining supervisory status as "whether there is substantial evidence that the LPNs do not serve in a supervisory capacity." *Beacon Light Christian Nursing Home*, 825 F.2d at 1078. As will be explained below, respondent has failed to establish, by substantial evidence, that the LPNs are not supervisors. Moreover, there is substantial evidence to support HCR's claim that the LPNs are, in fact, supervisors.

It appears that the staff nurses are indeed supervisors within the definition of § 2(11). Among a staff nurse's functions are the authority to assign the nurses aides and to responsibly direct them. The Director of Nursing assigns each aide to a certain shift. Once assigned to a shift, the staff nurse in charge is responsible for assigning each aide to a particular patient. Each aide assignment is based

primarily upon the needs of the patients [2], but also with an attempt to rotate the aides' assignments. When aides do not report to work or leave work early, it is the staff nurse's responsibility to attempt to find a replacement. A staff nurse has the authority to offer other aides the option of working overtime to fill such vacancies. Although it is the staff nurse's responsibility to find a replacement, the staff nurse has the discretion to determine how he/she will accomplish his/her duties. A staff nurse may also assign and/or approve breaks and lunches.

It is clear that the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present. As this court made clear in *Beverly*, § 2 (11) provides that an employee is considered a supervisor if *any one* of the enumerated job tasks are undertaken, provided the authority is exercised in the interest of the employer and requires the use of independent judgment. *Beverly Calif. Corp.*, 970 F.2d at 1548. The job duties of the LPN's at Heartland require the use of independent judgment and are taken in the interests of the employer. Accordingly, in the case *sub judice*, the LPN's must be considered supervisors within the meaning of the Act and, thus, outside the coverage of the National Labor Relations Act. Moreover, respondent failed to meet its burden of providing substantial evidence of non-supervisory status. Neither the ALJ's decision nor the Board's Order recognized that the burden

[2] Certain patients may require more aides based on the patients' physical and mental infirmities.



rested not on HCR, but on respondent. A burden which was not met.

As this court stated in *Beverly*, it is up to Congress to carve out an exception for the health care field, including nurses, should Congress not wish for such nurses to be considered supervisors. It is the responsibility of this Court to interpret the law as written by Congress and promulgated through case decisions. Although the Board has maintained it will not yield this point, when the facts so warrant, as in the case at bar, this court must reverse the decision of the Board. Since the staff nurses are supervisors and not covered under the Act, this court need not review the merits of the unfair labor practice claims.

## IV.

The petition for review is GRANTED, the Board's Order of January 21, 1992 is VACATED, and the cross-application for enforcement is DENIED.

## APPENDIX B

HEALTH CARE & RETIREMENT CORP. OF AMERICA
AND RUBY A. WELLS

Case 9-CA-26348

January 21, 1992

## DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT,
AND RAUDABAUGH

On October 22, 1990, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions with a supporting brief and an answering brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

### Background

The facts, as more fully set forth by the judge, may be summarized as follows. The Respondent operates a nursing home in Urbana, Ohio, where it employed the alleged discriminatees, Julia Goldsberry,



Cynthia Cordrey, and Ruby Wells, as licensed practical nurses (LPNs).[1]

During the latter part of 1988 and early January 1989, there were perceived to be problems at the facility, many of which became topics of conversation among the employees. These included what some employees thought were the Respondent's disparate enforcement of its absentee policy, short staffing, low wages for nurses aides, the Respondent's unreasonably switching its prescription business from one pharmacy to another, which increased the nurses' paper-

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[1] The judge found, and we agree, that the Respondent's staff nurses are employees within the meaning of the Act. In his analysis, the judge relied on *Ohio Masonic Home*, 295 NLRB No. 44, slip op. at 10 fn. 7 (June 15, 1989), for the proposition that the General Counsel has the burden of proving that the nurses are employees, and not supervisors. We disagree. The party alleging supervisory status, in this case, the Respondent, bears the burden of proving an individual is a supervisor. *St. Alphonsus Hopital*, 261 NLRB 620, 624 (1982). See also *Commercial Movers*, 240 NLRB 288 (1979). We find that the Respondent failed to meet this burden.

We disagree with the Respondent's argument that the Sixth Circuit's ruling in *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (1987), requires a different result. In that case, the court held that "[t]he Board always has the burden of coming forward with evidence showing that employees are not supervisors in bargaining unit determinations." *Beacon Light*, at 1080. The Board has not acquiesced on this point. See *Ohio Masonic Home*, supra. In any event, we found that the preponderance of the evidence establishes that the nurses are employees.

Member Oviatt agrees with his colleagues that under the facts of this case the nurses are employees. But see his dissent in *Riverchase Health Care Center*, 304 NLRB No. 111 (Aug. 27, 1991).

work, and management's failure to communicate with employees.

On January 10, 1989, nurses Goldsberry, Cordrey, and Wells asked to meet with Brenda Stabile, the Respondent's administrator, to discuss these problems. Stabile stated that she was too busy to meet with them and that they should make an appointment for later in the week. The nurses discussed what action they should take and decided to speak with an official at the Respondent's headquarters in Toledo.

The next day the nurses drove to Toledo and met for an hour with Jim Millspaugh, the Respondent's director of human resources, and Bob Possanza, the Respondent's vice president for operations. They voiced the complaints and concerns of the nursing staff. Millspaugh agreed to investigate and to report back to them. Possanza assured the nurses that they would not be harassed for bringing their concerns to headquarters' attention.

Millspaugh notified both the Respondent's regional manager, Dee Nevergall, and Stabile of the visit and about the matters raised by the nurses. Millspaugh then launched his own investigation which culminated in the Respondent's hiring more aides, increasing the wages for the aides, and disciplining and subsequently terminating Goldsberry, Cordrey, and Wells.[2]

The judge found that the General Counsel failed to prove that the nurses were unlawfully terminated or, except for one instance, disciplined for engaging in protected concerted activity. He credited Mill-

[2] Another nurse, Connie Thatcher, who did not participate in the Toledo meeting, was also disciplined.



spaugh's testimony that on March 2, at his final meeting with employees at the facility, the three nurses conveyed an attitude of "resistance to change . . . to . . . make Heartland of Urbana a good facility." According to Millspaugh, this "attitude" or "demeanor" was reflected in the three nurses crossing their arms and rolling eyes in response to comments made by Millspaugh. The judge concluded, however, that the nurses' nonverbal body movement was not protected by the Act because there was "no indication that the nurses intended that their body postures and facial expressions be seen by Millspaugh as communication." The judge found further that there were too many "links in the causal chain" to conclude that the nurses were terminated for having complained to higher management in Toledo. The General Counsel excepts. For the reasons set forth below, we agree with the General Counsel.

## The Discharges

Millspaugh visited the Urbana facility on three different occasions in response to the three nurses' concerns. On January 16, 1989, he met with the department heads. At this meeting he asked each person to name anyone associated with the tension and unrest in the facility. He explained that he had recently become aware of this situation through his talks with Stabile and Regional Manager Nevergall. Cordrey's and Wells' names appeared on every slip and Goldberry's name apeared on many. A few other employees were named, but not as often as any of those three.

Two days later, Millspaugh met with the employees in each dpartment. He listened to their complaints and concerns. Millspaugh determined that

the concerns raised by the three nurses were shared by many others, and that some of their complaints were valid. Millspaugh cautioned, however, that the employees were supposed to support decisions made by management, and he felt that all the nurses agreed with him on this point.

On March 2, Millspaugh traveled to the Urbana facility for the final time to meet with all the nurses to inform them of the results of his investigation. He met privately with Goldsberry, Cordrey, and Wells before the general meeting to tell them of his decisions. During the meeting with all the nurses, Millspaugh testified that there was some "heated conversation" among the nurses about the appropriateness of the policies at the facility and about how things should be done. Millspaugh testified that he observed "resistive behavior" on the part of Goldsberry, Cordrey, and Wells to his comments. In particular, he observed that they rolled their eyes and sat with their arms crossed. According to Millspaugh, the three nurses thereby demonstrated that they were unwilling to change their mode of operation, attitude, or cooperation for the good of the facility. Based on his observations and perceptions of the three nurses at the meeting, Millspaugh made the decision to terminate them. He consulted with Regional Manager Nevergall and two others who agreed with him that the discharges were appropriate. On March 14, Stabile told Cordrey and Wells that they either had to resign or they would be fired. Both refused to resign and they were fired. On March 16, Goldsberry was given the same option. Goldsberry resigned. All three were told that the Respondent's resign-or-be-fired ultimatum was because of their "attitude" and their opinion of management.



Conclusions on Discharges

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),[3] the Board set forth its causation test for cases alleging violations of the Act that turn on employer motivation. The General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. The burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. In rebutting the General Counsel's case, the employer cannot simply present a legitimate reason for its action, but must also persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Applying these principles to the facts of this case, we find that the discharges of Goldsberry, Cordrey, and Wells violated the Act.

We find that Goldsberry, Cordrey, and Wells engaged in protected activity by traveling to Toledo to speak with members of management about workplace matters of concern to the employees and that they continued to engage in protected conduct up to and including the meeting on March 2.[4] An infer-

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[3] *Wright Line* was approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[4] We reject the Respondent's argument that the discriminatees' activities lost the protection of the Act because their "carping" was not directed towards improving the lot of employees. First, we find that one trip to management headquarters to discuss legitimate employee concerns does not

ence that their protected conduct was a motivating factor in Millspaugh's decision to discharge them is plain from his testimony. The judge credited Millspaugh's testimony that he made the decision to terminate Goldsberry, Cordrey, and Wells after observing their "attitude" and/or "demeanor" at the March 2 meeting. Their "demeanor" indicated to Millspaugh that they were resistant to change and to getting "on board" to make the Respondent a good facility. Millspaugh's meeting with the nurses on March 2 to announce the results of his investigation, at which he observed the three discriminatees' demeanor, would not have occurred had the discriminatees not traveled to Toledo to discuss their concerns with management.[5] Further, their "body language" reaction to Millspaugh's statements at the March 2 meeting plainly evidenced their dissatisfaction with the extent to which Millspaugh was willing to remedy their perceived inadequacies in working conditions. Although Millspaugh did not testify that the nurses' demeanor was the sole reason for their discharges,[6]

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establish a pattern of constant criticisms and attacks on management as alleged by the Respondent. Second, we fail to see how discussing employee wages, enforcement of absentee policies, short staffing, and poor communication between management and employees could be construed as anything other than an attempt to improve employee working conditions.

[5] See *Bronco Wine Co.*, 256 NLRB 53 (1981).

[6] Millspaugh testified that as a result of his investigation, he determined that Goldsberry, Cordrey, and Wells were the employees mainly responsible for the tension and unrest at the facility. He also testified that he was told that each of the three nurses spoke with residents and family members about problems at the facility. The Respondent, however, offered no evidence in support of these allegations. It is undisputed that no member of management ever contacted any resident or family member nor were any of the disincriminatees asked to confirm or deny these allegations. We find no evidence in the record to support them.



the Respondent does not dispute the judge's findings that their demeanor at the March 2 meeting, which we have found to be protected concerted activity, was a factor in the decision to discharge them. Accordingly, we find that the General Counsel has presented a prima facie case to support the allegation that the nurses' discharges violated Section 8(a)(1).

We further find that the Respondent has failed to demonstrate that it would have taken the same action against Goldsberry, Cordrey, and Wells in the absence of their protected activity. Although Millspaugh testified that he took into consideration other factors, he was emphatic that the main reason for the nurses' discharge was their resistance to policy changes.[7] The record, however, is barren of any testimony or evidence indicating any instance where any of the three discriminatees defied an order or failed to cooperate with a management decision. What remains is a decision to discharge employees because of their protected activity, without any evidence that the Respondent would have taken the same action in the absence of the protected activity.[8]

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[7] The Respondent offered no evidence to show that any other employee had ever been discharged for "resistance" to policy changes.

[8] Millspaugh's references to the employees' "demeanor" and "resistance to change" indicate that he believed that Goldsberry, Cordrey, and Wells would continue to engage in the same type of activity as they had been. These activities including discussing and bringing to the attention of management workplace matters of legitimate concern to the em-

The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves.[9] The Board and courts have found, nonetheless, that an employee's

ployees. These activities are protected under the Act. We find, therefore, that Millspaugh's stated reasons for discharging the discriminatees support finding a violation of Sec. 8(a) (1).

Similarly, the judge suggests that the Respondent, in deciding to discharge the three nurses, could lawfully rely on Cordrey's statements to Millspaugh on March 2 both before and after the main meeting because they were not protected by the Act. As noted, Millspaugh met privately with the three nurses to inform them of his decisions. Those decisions were not, in the view of the nurses, sufficiently responsive to the problems at the nursing home. In the premeeting, Cordrey responded to Millspaugh's statement that he felt Stabile now knew that she had to cooperate with the nurses to make the facility run effectively. Cordrey told Millspaugh that his efforts "hadn't helped." In response to Millspaugh's request for her to become "part of the solution," Cordrey commented to Millspaugh after she left the meeting that she (Cordrey) was "not part of the problem." Contrary to the judge, we find that Cordrey's remarks were protected and demonstrated that Cordrey intended to continue to work for changes at the nursing home. Further, Cordrey's remarks offer no basis for discharging Wells and Goldsberry—unless the Respondent's intention was to end all protected activity.

[9] In *Consumers Power Co.*, 282 NLRB 130, 132 (1986), the Board stated:

> . . . when an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further service.

See also *Hawaiian Hauling Service*, 219 NLRB 765 (1975).



flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer.[10] Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7.[11]

We find that the conduct engaged in by Goldsberry, Cordrey, and Wells (i.e., their "demeanor"), and for which they were allegedly discharged, was mild if not innocuous.[12] Thus, the employees' protected activities did not lose the protection of the Act. Under these circumstances, we find that Julia Goldsberry, Cynthia Cordrey, and Ruby Wells were discharged in violation of Section 8(a) (1) of the Act.

## The Disciplinary Warnings

On February 27, 1989, Cordery received three written warnings and Wells received four. Nurse

[10] See, for example, *Chrysler Corp.*, 249 NLRB 1102 (1980).

[11] See *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), enfd. 430 F.2d 724 (5th Cir. 1970); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Postal Service*, 241 NLRB 389 (1979); *Burle Industries*, 300 NLRB No. 50, JD slip op. at 11-14 (Oct. 15, 1990); *Marion Steel Co.*, 278 NLRB 897 (1986). See also *Severance Tool Industries*, 301 NLRB No. 147 (Feb. 28, 1991).

[12] Surely the employees' "body language" included none of the vulgarity or rudeness like that permitted in the cases cited above.

Connie Thatcher received two written warnings on February 23 and another four on March 10.

### A. *Warnings About Improper Documentation*

Nurses Cordrey and Thatcher received a notice of "verbal warning" for mistakes made in their January 1989 treatment records and Wells received a more serious "written warning" for the same offense. All the warnings were dated February 15.

The Respondent previously had employed a patient-assessment nurse who had corrected errors in the nurses' treatment records. None was employed, however, during the latter part of 1988. On February 1, 1989, the Respondent was notified by the State of Ohio that its records for the months of November, December, and January were to be audited the next day. Members of management attempted to review the records and make the necessary corrections. They corrected the A wing records but did not have time to correct the B wing records. They found numerous errors committed by many nurses in the A wing, but only nurses Cordrey, Thatcher, and Wells were disciplined.

### B. *Discipline of Cordrey and Wells for Missing an "Inservice"*

Periodically, the Respondent conducts training services for its nurses called "inservices." For some inservices, attendance is mandatory. On February 16, the Respondent conducted a mandatory inservice on documentation. Although many nurses missed the meeting, only Cordrey and Wells received written disciplinary notices for doing so.



### C. *Discipline of Thatcher Regarding Assignment of Aides*

On March 9, the Respondent's director of nursing instituted a new system for the assignment of aides. Thatcher had some difficulty that night in following the new instructions, leading to some problems among her aides the next day. On March 10, Thatcher was disciplined for not following instructions.

### D. *Discipline of Cordrey, Wells, and Thatcher for Excessive Absences and Wells' Discipline for an "Unexcused Absence"*

The Respondent maintained a policy that two absences in 1 month or six absences in 1 year are excessive and will result in progressive discipline. The policy had been routinely ignored, but sometime in late 1988 or early 1989, the policy was reimposed.

To arrive at the number of absences necessary to discipline Cordrey, management included an absence for funeral leave, a specified employee benefit. Wells was issued two warnings, both of which included the same absence. Wells had volunteered to work on Friday, February 3, which was not her regular workday, provided Administrator Stabile informed her in advance who her replacement was. Stabile did not do so, nor did the February schedule contain Wells' name for that Friday. Wells left Stabile a note that morning confirming that she assumed she was not to work because she had not heard back from Stabile and her name was not on the schedule. Stabile proceeded to brand Wells a "no call/no show" and disciplined her for an unexcused absence as well as for two occurrences in a month.

## Conclusions on Discipline

The judge concluded that none of the disciplinary actions were taken as a result of the nurses' protected concerted activity in connection with their traveling to Toledo.[13] We disagree.

We find that the General Counsel made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to discipline Cordrey, Wells, and Thatcher. Each of the disciplinary actions occurred shortly after Goldsberry, Cordrey, and Wells went to Toledo and in the middle of Millspaugh's resultant investigation of their complaints and concerns.[14] Thus, after the employees engaged in protected concerted activity, the Respondent began a course of disciplinary action against them. Stabile testified that prior to February 27, neither Cordrey nor Wells had ever been written up, reprimanded, or otherwise disciplined.[15] In fact, on a loan form

[13] The judge found that the discipline of Cordrey and Wells for missing the February 16 "inservice" violated Sec. 8(a)(1). He did not find, however, that the discipline was in response to the nurses' protected concerted activities in conjunction with their trip to Toledo, but rather that it was based on management's belief that the nurses were protesting certain management policies. For the reasons set forth in our decision, we find the discipline violated Sec. 8(a)(1) but not for the reasons stated by the judge.

[14] Thatcher, admittedly, was not one of the "Toledo travellers." She was, however, a "good friend" of the three according to Stabile. Stabile also testified she associated Goldsberry, Cordrey, Wells, and Thatcher together as the leaders of the complaining group and that she considered all four nurses to be resistant to management policies.

[15] Cordrey had worked for the Respondent for almost 5 years and Wells had worked there for over 2½ years.



submitted by Wells to the Respondent dated December 15, 1988, the Respondent marked her probability of continued employment as "excellent."

The Respondent's motive is fully revealed by the disparate way in which the warnings were given out.[16] For example, the writeups for the documentation errors were dated February 13, but the nurses were not notified until the February 16 inservice that such errors would result in discipline. Further, Stabile admitted that, during the course of management's examination of the treatment records, she noticed that many nurses had made a high number of errors, but that only Cordrey, Wells, and Thatcher were disciplined. Stabile testified that the reason they were singled out was because they had attended a previous inservice on documentation. We find this argument unpersuasive in light of the fact that at least one other nurse had attended the earlier inservice, made errors in February, and was not disciplined. Also, the nurses had previously relied on a patient-assessment nurse to either point out their errors or to correct them, and no one had been previously reprimanded for treatment-records errors.

The Respondent offered no justification for issuing written disciplinary notices to Cordrey and Wells for missing the February 16 inservice. Other nurses did not attend, but they were not disciplined.[17] Further, the Respondent did not follow its own policy of giv-

[16] We note that Goldsberry was not disciplined. The Respondent, however, attempted to justify her discharge on the same grounds as Wells' and Cordrey's.

[17] One nurse scheduled for the inservice called in sick and another missed the inservice to take her son to the dentist, and neither was disciplined.

ing 2 weeks' notice for a mandatory inservice. Cordrey was not on duty at any time between the announcement and the inservice itself, and both Cordrey and Wells had advised management in advance of the inservice that they could not attend because both had sick children.[18]

Finally, we find it more than purely coincidental that the Respondent's absenteeism policy, which previously had been either loosely enforced or not enforced at all, was suddenly strictly enforced to the detriment of Thatcher, Wells, and Cordrey. This occurred shortly after Wells and Cordrey had traveled to Toledo and after many of the nurses, including Thatcher, had discussed problems at the facility among themselves. The Respondent went to great lengths to find that Cordrey and Wells violated its absenteeism policy, charging Cordrey with an absence for funeral leave, which employees are permitted to take as a benefit, and charging Wells with an absence on a day she was not scheduled to work. We find that the Respondent more strictly enforced its attendance policy against the discriminatees in response to their protected activities.[19]

We find that the Respondent has offered no credible explanation to justify its disciplinary action against Cordrey, Wells, or Thatcher. We therefore find that the Respondent did not meet its burden under *Wright Line* of establishing that it would have

[18] Cordrey learned about the inservice from another nurse before February 16.

[19] The issuance of warnings pursuant to a policy of stricter enforcement instituted in response to protected activity violates Sec. 8(a)(1). See *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987).



taken the same action regardless of the nurses' protected concerted activity. We therefore, find that each warning violated Section 8(a)(1).

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act.

We shall also order the Respondent to offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed and to make them whole for any loss of earnings and other benefits suffered because of the discrimination against them, less any net interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

## ORDER

The National Labor Relations Board orders that the Respondent, Health Care & Retirement Corp. of America, Urbana, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they have engaged in protected concerted activities.

(b) Issuing disciplinary notices and warnings to employees because they have engaged in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the discharge of Cynthia Cordrey and Ruby Wells and the resignation of Julia Goldsberry and notify them in writing that this has been done and that evidence of the discharges or resignation will not be used as a basis for any future personnel actions against them.

(c) Remove from its files any reference to the unlawful disciplinary actions taken against Cynthia Cordrey, Ruby Wells, and Connie Thatcher and notify them in writing that that this has been done [and] that evidence of the disciplinary actions will not be used as a basis for any future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying,



all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, joint, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT issue disciplinary notices and warnings to any of you because you have engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercises [sic] of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Julia Goldsberry, Cynthia Cordrey, and Ruby Wells immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole



for any loss of earnings and other benefits resulting from the discharges or resignation, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to the discharges or resignation and that the discharges and/or resignation will not be used against them in any way.

WE WILL remove from the files of Cynthia Cordrey, Ruby Wells, and Connie Thatcher any reference to the disciplinary notices and warnings issued to them and WE WILL notify them in writing that this has been done and that the disciplinary actions will not be used against them in any way.

HEALTH CARE & RETIREMENT CORP.
OF AMERICA

**APPENDIX C**

JD-247-90
Urbana, Ohio

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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Case No. 9-CA-26348

HEALTH AND RETIREMENT CORPORATION OF AMERICA

and

RUBY WELLS, AN INDIVIDUAL

*Engrid Emerson Vaughn, Esq.*, for the General Counsel

*R. Jeffrey Bixler, Esq.* (*Cooper, Straub, Walinski & Cramer*), of Toledo, Ohio, for the Respondent [1]

DECISION

Stephen J. Gross, Administrative Law Judge. The Respondent, Health Care and Retirement Corporation of America (HCR), owns and operates about 140 fa-

[1] The Charging Party was represented at the hearing by Pattrick Dunphy, Esq., of Dayton, Ohio. But he later requested permission to withdraw as counsel, and I granted the request.



cilities in 27 states.[2] All but two are nursing homes. The only HCR facility we are concerned with here is a nursing home in Urbana, Ohio. HCR calls it Heartland of Urbana." (I will henceforth refer to Heartland of Urbana simply as "Heartland." [3]) Heartland's employees are not represented by a union.

The General Counsel alleges that HCR disciplined several Heartland nurses, and fired three of them, because the nurses engaged in protected activities, thereby violating Section 8(a)(1) of the National Labor Relations Act (the Act). HCR claims that it acted against the nurses for entirely appropriate, lawful, reasons. HCR also claims that Heartland's nurses are "supervisors" within the meaning of the Act, not "employees." And as the General Counsel agrees, if the nurses are supervisors, then HCR did not violate the Act even if its motivations were as alleged by the General Counsel.

I. *Are Heartland's Nurses Supervisors Or Employees*

Section 2(11) of the Act defines "supervisor" as—

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in con-

[2] HCR admits that it is an employer engaged in commerce.

[3] HCR calls many of its facilities "Heartland," as in Heartland of Lansing, Heartland of Beaver Creek, and so on. But none of HCR's other "Heartlands" are pertinent to the discussion here.

nection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The period at issue here is January through mid-March of 1989. If, during that period, HCR bestowed on the alleged discriminatees any of the authority to which Section 2(11) refers, they were supervisors, not employees. *E.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989).

This part of the decision considers whether HCR did bestow any such authority on those Heartland nurses during such period.[4] Because Section 2(11) is to be read "in the disjunctive" (*id.*), as I consider each facet of the nurses' authority I will state my conclusion about whether it constitutes the kind of authority encompassed by Section 2(11).

*The Organization Of Heartland's Nursing Department*

Anyone who has read virtually any of the dozens of Board cases on the status of nurses at nursing homes will be generally familiar with the organization of Heartland. It is a 100-bed facility divided into two wings, A and B. Heartland is headed by an administrator and, under the administrator, a number of department heads, including the director of

[4] For simplicity's sake I use the present tense in discussing the nurses' authority and responsibilities. But the record suggests that the authority and responsibilities of Heartland's nurses may have changed subsequent to the period of concern to us here.



nursing (the D.O.N.), who heads Heartland's nursing department. The D.O.N. is seconded by an assistant D.O.N. (the A.D.O.N.). (All parties agree that the D.O.N. and the A.D.O.N. are supervisors within the meaning of the Act.)

There are around 65 personnel in the nursing department under the D.O.N. and A.D.O.N., as follows:

—a "patient assessment nurse" and a "treatment nurse"

—9 to 11 staff nurses (mostly licensed practical nurses (LPNs), with a few registered nurses (RNs))[5]

—50 to 55 nurse aides

One staff nurse is always on duty in each wing. (The treatment nurse does not figure in the events at issue here, and the patient assessment nurse does so only tangentially. I accordingly will refer to the staff nurses simply as "nurses.") Generally at least two aides are on duty in each wing, and sometimes as many as six are. (That variation in the number of on-duty aides will be discussed in more detail below.)

*The Duties Of The Nurses, Generally*

In the main Heartland's business is the long-term care of the infirm elderly. None of Heartland's residents can wholly take care of themselves. Some are unable to move by themselves, or dress themselves, or

[5] As it happens, the nurses who were the subject of the actions by HCR that the General Counsel alleges violated the Act were all LPNs. But the evidence shows that the duties of the staff nurses were virtually the same whether the nurses were LPNs or RNs.

bathe themselves, or feed themselves, or control their excretory functions. Some are even unable to change their position in bed by themselves. Some of the residents must be restrained to prevent them from injuring themselves. Sudden medical problems are not uncommon. Nor is death. Many of the residents need medication. Sometimes that medication is part of a day in, day out regimen. In other cases the medicine is needed to deal with a non-routine problem—often relatively benign (a headache, for instance), sometimes not (as in a sudden increase in blood pressure).

Heartland's aides are the ones with whom the residents have the most direct contact. It is the aides who bathe and dress the residents, comb their hair, push their wheelchairs, feed them, deal with their bed pans, and the like.

But by and large it is the responsibility of Heartland's nurses to ensure that the needs of the residents are met. As a practical matter that means that the nurses check for changes in the health of the residents, administer medicine, call physicians when that's warranted, oversee the work of the aides, maintain detailed records on treatment accorded the residents, receive status reports from the nurses they relieve and give status reports to aides coming on duty and to the nurses' reliefs, and handle incoming telephone calls from physicians and from relatives of residents who want information about a resident's condition. It can also mean bathing, feeding or dressing residents when an insufficient number of aides show up for work. Very little of the nurses' time is spent on matters that even suggest supervisory status.

Certainly the nature of the nurses' work points generally in the direction of employee status. On the



other hand, the nurses do have authority over the aides and have responsibilties regarding the aides (as will be discussed). And the fact that the nurses spend only a small fraction of their time exercising that authority and those responsibilities by no means excludes the possibility that the nurses are supervisors. *E.g., Northwoods Manor, Inc.*, 260 NLRB 854 (1982).

*The Nurses' Role In Assigning Work to Aides*

A description of the role of nurses in assigning work to aides is complicated by shift-to-shift variations in the aides' work, shift-to-shift variations in the number of aides on duty, and by the fact that during the relevant period the aides worked 8-hour shifts while the staff nurses worked 12-hour shifts.

Nurses work from either 7:00 a.m. to 7:00 p.m., or from 7:00 p.m. to 7:00 a.m. And as touched on earlier, there are always two staff nurses on duty, one at the nurse's station on each wing. The aides, on the other hand, work as follows:

**7:00 a.m.- 3:00 p.m.—6 aides per wing**
**3:00 p.m.-11:00 p.m.—4 aides per wing**
**11:00 p.m.- 7:00 a.m.—2 aides per wing, with one "float"**

*Shifting aides from wing to wing.* If an aide doesn't show up for work, the nurse on the understaffed wing (the A wing, say) may discuss with situation with the nurse on duty in the other wing (the B wing, in this example). That, in turn, may result in the two nurses agreeing that one of the B wing aides should switch during that shift to the A wing. The B wing nurse has the authority in that circumstance to order one of the aides to go over

to the A wing. But as a practical matter the nurse lets the aides decide among themselves who will work on the other wing.

(Another possible response is for the nurse on the affected wing to try to find a replacement for the missing aide. That will be discussed below.)

*The role of the night-shift nurses in assigning duties to aides.* Two of the nurses against whom HCR allegedly discriminated, Cynthia Cordrey and Ruby Wells, always (or almost always) worked the night shift, from 7:00 p.m. to 7:00 a.m. When nurses on that shift come on duty the four aides already there have previously been given their assignments. The night nurse doesn't change those assignments. Then, at 11:00 p.m., those four aides (per wing) leave, and two aides come on duty. But the two aides work togther to cover the whole wing. And aides on that shift rarely have any off-wing duties to handle. So apart from having occasionally to switch an aide from one wing to another (as just discussed), the night-shift nurses have no role in assigning work to aides.

*The job assignment role of the day-shift nurses.* It is up to the day-shift nurses to tell each aide which residents the aide is to care for. Some residents require much more care from aides than others. Moreover the amount of care each of the residents requires varies from day to day depending on things like whether the resident is scheduled for a shower. And in making up the assignments the nurse has to factor in the aides' off-wing duties. (Some aides, for example, assist in the dining room during the residents' meals.) But the job of assigning work to the aides does not demand great skill and finesse of the nurses. Every aide is able to do the work of every other aide.



And the nature of the aides' work is not highly technical. Also, it is Heartland's office, not the nurses, that specifies the off-wing work of the aides. In addition, throughout most of the period of interest to us, the nurses followed old patterns when setting up the aide-resident assignments (so that little thought went into the process). Lastly, the nurses routinely let the aides decide among themselves which aide was to cover which residents.

On the other hand, the way the nurses divide up the work among the aides (on the daytime or evening shifts) can have a considerable impact on how hard each of the aides has to work. Also, on about March 9 (which was subsequent to all of the events that led HCR to decide to fire nurses Cordrey, Goldsberry and Wells) the D.O.N. ordered a somewhat changed procedure for assigning work to the aides. At least one of Heartland's day-shift nurses, Connie Thatcher, seemed to have a lot of trouble working out appropriate assignments for the aides under the new procedure.

Using Section 2(11)'s standards of "routine," on the one hand, and "independent judgment," on the other, I conclude that the job assignment task of Heartland's nurses does not show the nurses to be supervisors. Heartland's night-shift nurses, of course, hardly have any assignment functions at all. As for the day-shift nurses, they have the authority to vary the aides' assignments in ways that can make a difference to the aides, and they are expected to exercise judgment in exercising that authority. But just about any task demands the exercise of some judgment. The question, therefore, is the nature of that judgment. And given the nature of the aides' work

and the fact that each aide has the skills to do the work of any other aide, the aide assignment duties of the nurses seem to me to fall well short of "requir[ing] the use of independent judgment," as that expression is used in Section 2(11). See, in this regard, *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983); *Ohio Masonic Home*, 295 NLRB No. 44 (June 15, 1989).

*Directing The Work Of The Aides*

Once the aides have their assignments, there is little for the nurses to do in the way of "directing" them. It is clear that the nurses have the authority to criticize an aide for improperly performing a task, to tell an aide to redo a task inadequately done, and to direct an aide to do any minor chore that isn't covered by the assignment sheet. Nurses also issue orders related to any change in the condition of a resident. For example, "please watch Jane Doe particularly carefully," or "take John Jones' temperature in an hour." Finally, the nurses have the authority to determine when the aides may take their work breaks; but as a practical matter the aides usually work that out among themselves.

That does not equate to "responsibly . . . direct-[ing]" the aides "in the interest of the employer." Apart from the fact that the nurses' focus is on the well-being of the residents rather than of the employer, the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be "employees." See, *e.g.*, *NLRB v. Res-Care, Inc.*, above.



*Calling In Off-Duty Aides; Aides' Overtime; Aides Leaving Work Early*

If an aide doesn't show up for work, the nurse on duty on the affected wing of the facility is authorized to and, indeed, is expected to, obtain a replacement.

One way the nurse does that is by telephoning off-duty aides and asking those aides if they want to work an extra shift or partial shift (generally at overtime pay rates). A list of Heartland's aides, with their telephone numbers, is posted at each of the nursing stations. The nurse on duty simply calls aides on the list until an aide is found who is willing to come in. There apparently is no pre-set order for calling the aides. So to that extent the nurse has some discretion in the matter. But the nurse has no authority to order an off-duty aide to come to work. And the record indicates that neither the nurses' superiors, nor the nurses themselves, nor the aides, consider that discretion on the nurses' part to be of any import.

The second way the duty nurse may attempt to deal with an aide's failure to show up for work is to ask the aides who are scheduled to go off duty if one of them is willing to remain at the facility, on overtime. (Nurses have no authority to require any aide to remain on duty past the aide's scheduled departure time.[6]) If more than one of the aides wants the overtime work, the nurse typically lets the aides de-

[6] It is thus not uncommon for all of the aides on duty to leave the facility at the end of a shift even though the following shift is going to be short-handed. By contrast, if the duty nurse's replacement fails to arrive, the duty nurse has to remain on duty until a replacement can be found.

cide among themselves which of them will remain at work.

The nurses otherwise have no authority to grant overtime. Thus the nurses are not authorized to deal with an unusually heavy workload by asking aides to work on an overtime basis.

Heartland's nurses have no authority to let an aide leave work early for personal reasons. But if an on-duty aide wants to leave early because she feels sick, she makes the request to the nurse. Since a sick aide obviously must be allowed to go home, however, that "request" is really more of a notification than an asking to be allowed to leave.

Nurses also perform various clerical-type functions related to aides arriving late or leaving early—such as initialling time cards when an aide has worked overtime and recording the fact of an aide's absence.

None of the nurses' functions relating to having aides work overtime, handling requests to leave early because of sickness, or the like, suggests supervisory authority on the nurses' part. In fact the limitations of the nurses' authority in this respect suggests employee status. See *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB No. 40 (Nov. 28, 1989); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989); compare *Beverly Manor Convalescent Centers*, 661 F.2d 1095, 1100 (6th Cir. 1981) (nurses who had authority "to adjust . . . employee schedules in accordance with the vagaries of manpower needs" may nonetheless be "employees" rather than "supervisors").

*Calling In "Pool" Aides*

Employment agencies are available that can on short notice supply an aide (or a nurse) to a nursing



home on a temporary basis. But the services of an aide from such a "pool" cost Heartland considerably more than the services of one of its own employee-aides. Heartland's nurses wanted the authority to call one of the pools when necessary to deal with shortages of aides on their shifts. But throughout the period under consideration here, the nurses' supervisors explicitly advised the nurses that they were not authorized to bring in any pool aides.

*Rewarding/Promoting Aides*

While in theory an aide's pay may vary depending upon his or her level of performance, in actuality the pay level of Heartland's aides depends solely on their seniority. All the aides do the same work. They have the same titles. Heartland never promotes its aides to a better job. So Section 2(11)'s "reward" and "promote" language is beside the point here.

*Disciplining Aides; Discharging Aides*

As touched on earlier, every Heartland nurse routinely speaks to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly. But criticism of that sort does not affect the aides' careers at Heartland.

Heartland keeps a supply of "employee counseling forms" at both of the nurses' stations. The forms have spaces for the nurse on duty to describe the "problem," for the aide to make a "statement," for the nurse to describe the "resolution of problem or action taken," and for the nurse and the aide to sign the form. At her discretion a nurse may use a counseling form to raise with an aide problems such as the aide being "too bossy," improperly passing work off

onto other aides, not working fast enough, and "not positioning patients properly."

Nurses deliver completed counseling forms to Heartland's office where, as far as the nurses are concerned, the forms disappear. In fact Heartland retains the completed forms in the aides' personnel files. The record contains no indication that the counseling forms that the nurses drafted have ever had a deleterious impact on any aide.

In that regard I will assume that the General Counsel has the burden of proving that the nurses against whom HCR allegedly discriminated were "employees," and, therefore, not supervisors.[7] But here we are considering a subissue that ordinarily should be able to be easily resolved on the basis of records in the Respondent's possession. Given HCR's failure to produce any evidence that an aide's being the subject of counseling forms ever affected the aide's career with Heartland, I conclude that the nurses' role in completing counseling forms regarding aides' behavior is not an indication of supervisory authority.

Nurses routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N. Sometimes those reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge. And sometimes the nurse sits in on the conference between the administrator or D.O.N. and the aide in which the aide is advised of that action. But the nurses themselves do not penalize any aide or threaten any aide with future penalties. And with

[7] See *Ohio Masonic Home*, 295 NLRB No. 44, slip op. at 10, fn. 7 (June 15, 1989).



only minor exception the nurses do not recommend that any aide be penalized.

The Heartland nurses have one other arguable connection to the supervision of the facility's aides: During some of the period at issue the nurses participated in "performance appraisals" of the aides.

Heartland's policy is to have a performance appraisal completed on each of its employees at the end of their probationary periods and at yearly intervals thereafter. At the start of the time period we are focusing on here the nurses did not have anything to do with the aides' performance appraisals. But beginning in February 1989, in the case of some aides, but by no means all, one of the nurses on whose shift the aide worked filled out much of the aide's performance appraisal form. (The marking choices were "excellent," "above standard," "standard," and "below standard." The areas covered were "human relations," "attitudes toward work," "personal appearance," "job capability," "development," and "patient care.") The nurses were told *not* to answer the forms' ultimate questions—about "overall evaluation" and whether or not to "recommend continued employment." After the nurses completed their parts of the forms they signed the forms as "evaluator," turned them in to one of their superiors and had no further relationship with the appraisals. Thus the nurses did not participate in the meeting between each aide and the administrator or D.O.N. at which the performance appraisal was discussed.

The record does not indicate whether a poor performance appraisal ever leads to the discharge of an aide, or to the threat of discharge. As with the counseling forms, it should have been an easy matter for

HCR to show that poor performance appraisals affect aides' jobs at Heartland. Since there was no such showing, I assume that the nurses' role in the performance appraisal process has no impact on the aides' jobs and that that role accordingly does not suggest supervisory status.

Indeed even if HCR had shown that it does fire aides who receive poor performance appraisals, the import of that in determining the nurses status would still be unclear. For one thing, the nurses performed the appraisals only during part of the relevant time period. For another, they did not perform appraisals on all aides even during that period. Thirdly, HCR made it clear that it did not want any recommendation from the nurses about the aides' "overall evaluation" or whether the aides should be retained as employees. And lastly, the nurses did not participate in the part of the process that had to have had the greatest impact on the aides—the meeting with the administrator or D.O.N. about the aide's performance.

I conclude that Heartland's nurses have no authority to "discipline" employees, to "discharge" them, or "effectively to recommend such action," as those terms as used in Section 2(11). See *Beverly Manor Convalescent Centers*, 661 F.2d 1095, 1100-01 (6th Cir. 1981); *Ohio Masonic Home*, above.

*Presence Or Absence Of Senior Personnel*

Heartland's administrator, its D.O.N., and its A.D.O.N. work daytime, weekday, hours. In the evenings and at night on weekdays, and all the time on weekends, the two nurses on duty are the senior personnel present at Heartland. That suggests supervisory status on the nurses' part. *E.g.*, *Emory Convalescent Home*, 260 NLRB 540 (1982); *Northwoods Manor, Inc.*, 260 NLRB 854 (1982). But it certainly does not compel the conclusion that the nurses are supervisors, particularly since the administrator and the D.O.N. are always on call, and since the nurses do in fact call the administrator and the D.O.N. at their homes when non-routine matters arise. See *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB No. 40, slip op. at 12 (Nov. 28, 1989); *Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989); compare *Northwoods Manor*, above (nurses never called the D.O.N. when the D.O.N. was off duty).



*Ratio of Supervisors to Employees*

As noted earlier, Heartland's nursing department includes the D.O.N. and the A.D.O.N. (both of whom are supervisors), about 10 nurses, and 50 to 55 aides. (For the purpose of this discussion I am excluding the patient assessment nurse and the treatment nurse.) Additionally, Heartland's administrator routinely involved herself in the direct supervision of personnel in the nursing department (including, for example, face-to-face discipline of aides). If the nurses are deemed supervisors, the department's ratio of employees to supervisors (including the administrator) is about 4:1. If the nurses are not categorized as supervisors then the ratio is about 20:1. Excluding the administrator from the count produces a 30:1 ratio. Worse yet, Heartland functioned without a D.O.N. between December 6, 1988 and February 6, 1989.

A 30:1 (or even a 20:1) ratio is so high that it points strongly in the direction of supervisory status

for the nurses. See *Children's Habilitation Center v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989); *Waverly-Cedar Falls*, above, slip op. at 11-12 (concluding that a ratio of 15:1 was "arguably unreasonabl[y]" large); *Phelps Community Medicial Center* (18:1 employee-supervisor ratio is "arguably unreasonable").

*Other Matters*

I have considered the nurses' role in grievance handling, the nature of the training that HCR gave them, their position descriptions, and the like. But none of those areas seem to me to be worth much weight in the determination of whether the nurses should be considered supervisors for purposes of Section 2(11).

*Are Heartland's Nurses Supervisors—Conclusion*

It is clear that in common parlance Heartland's nurses are "supervisors." They give orders (of certain kinds) to the aides, and the aides follow those orders. In a manner of speaking, certainly, the nurse on duty is in charge of a wing of the facility.

But Section 2(11)'s definition of supervisors is different from Webster's. And as I understand the meaning of that provision, Heartland's nurses were not supervisors during the period under consideration.

I'm greatly troubled by that 30:1 employee-supervisor ratio. But the employee-supervisor ratio is not a criterion written into Section 2(11). And analyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11), the nurses simply do not possess supervisory authority.



I have also tried to look at the situation as a whole to see whether a step-by-step analysis is misleading. But doing so makes it even clearer to me that Heartland does not endow its nurses with the kind of authority they have to have [sic] to be considered supervisors for purposes of the Act. Throughout the hearing I kept getting the impression that Heartland's administrator believed that the nurses' views about anything other than hands-on care of the residents were not worth considering. And as I view the evidence, it shows that the behavior of the administrator at Heartland repeatedly demonstrated that belief. It's true that the administrator and her superiors occasionally gave speeches and the like to the nurses that said "you are supervisors." But the actions of Heartland's administrator proclaimed in unmistakable fashion that, to HCR's management, Heartland's nurses were just hired hands.

II. *Did HCR Dismiss Cynthia Cordrey, Julia Goldsberry, Or Ruby Wells Because Of Their Protected Activities*

*The context.* The impression I got from the record as a whole is that Cynthia Cordrey and Ruby Wells are the kind of nurses one would want to have caring for oneself, one's relatives or one's friends. But I also got the impression that as Cordrey and Wells proceed through life: (1) at work they start from the point of view that their supervisors are incompetent and treat employees unfairly; and (2) they look for evidence that "proves" that that point of view is accurate, overlooking contrary facts. (As for Goldsberry, it seems likely to me that she is less prone to seeing life through lenses of that shape.)

At Heartland in late 1988 and early 1989, as it happens, there was evidence that supported Cordrey's and Wells' viewpoint about their supervisors.

For one thing, the facility was understaffed, particularly in respect to aides, and HCR wasnt' doing anything effective to remedy the problem.

For another, Heartland's administrator, Brenda Stabile, was relatively inexperienced and vastly overworked. (The extraordinarily low ratio of supervisors to employees in Heartland's nursing department has already been discussed, as has the two-month vacancy in the D.O.N. position. That had to have an impact on Stabile. Everyone connected with Heartland, particularly its nursing department, must have felt the effect of that situation.)

Third, Heartland was the kind of employer whose managers spoke frequently to employees about the importance of each employee being a part of the "team," when what they meant is "we want you to follow orders and to do so cheerfully."

*Pharmacy matters.* One of the management actions that most upset Cordrey, Goldsberry and Wells, along with most of the other Heartland nurses, was Heartland's switching of its pharmacy business from a pharmacy named "Village" to one called Beeber's."

Heartland's residents need medicine, sometimes routinely, sometimes to treat a medical emergency. For years Heartland had obtained the medicine from Village pharmacy, a mom-and-pop type operation in Urbana (where Heartland is located). Many of Heartland's nurses knew and liked Village's owner/pharmacist, Al Weber, and they particularly appreciated his willingness to quickly deliver emergency medication at any hour, even in the middle of the



night. Many Heartland residents, their physicians, and members of their families (who tended to live in or near Urbana, of course), also had long-standing, amicable relationships with Weber.

But not long after Stabile arrived at Heartland as its administrator (in July 1988), she concluded that Village had not been providing Heartland with various documentation that the State of Ohio required Heartland to have, that Village had not been fulfilling certain other state-mandated requirements, and that Village was not in a position to remedy those failings. Stabile apparently did not appreciate the strength of the relationships between the members of the Heartland community (employees, residents, residents' family members and physicians), on the one hand, and Village, on the other. So she decided to have Heartland use Beeber's, which is an "institutional" pharmacy located near Dayton (about 40 miles from Heartland). The switch became effective on December 1, 1988. As it turned out, the change had one further impact: it increased the amount of paperwork that Heartland required of its nurses.

Various Heartland residents, their families, and their physicians, responded with concern and, sometimes, anger, to the switch. Some of Heartland's nurses, including Cordrey and Wells, fed that concern and anger and, indeed, sometimes instigated it, by voicing their own concerns and anger about the change to those residents, families and physicians, and by saying that the change could impair the quality of the care that Heartland's residents received and might increase the cost of their medication. In part because of such comments by the Heartland nurses, Heartland's pharmacy change became the

talk of Urbana—and that talk was not kind to Heartland. That, in turn, resulted in a drop in the number of admissions into Heartland, to Heartland's financial detriment.

The period of this turmoil: from late autumn 1988 on into February 1989.

*The Meeting In Toledo on January 11.* On January 10 (1989) Cordrey, Goldsberry and Wells asked to meet with Stabile. They wanted to talk to her about various actions by Stabile (or failures on her part to act) that, they felt, were harmful to the residents and were making work more onerous for the nurses and aides. But Stabile said that she was too busy to meet with them just then, that they should make an appointment for later in the week.

The three nurses responded by travelling the next day (on their own time) to HCR's corporate headquarters in Toledo. They met with an HCR vice president, Bob Possanza, and with HCR's director of human resources for operations support, Jim Millspaugh. The three nurses voiced four concerns. One was that Heartland employed an insufficient number of aides and that Heartland's wage level for aides and lack of aggressiveness in recruiting aides ensured that the facility would continue to employ an insufficient number of aides. Another was that Heartland seemed to be allowing one aide to blatantly violate the facility's attendance rules which, in turn, embittered all the other aides. The third item the nurses complained about was the recent switch in the pharmacy that Heartland used. That switch, the nurses said, impaired the quality of the care that Heartland's residents were receiving. Lastly the three nurses spoke about the difficulties that Heartland's nurses had in communicating with Stabile.



All in all, Cordrey, Goldsberry and Wells made it clear that they considered Stabile to be mismanaging Heartland.

Once the nurses had had their say Possanza assured them that they would not be harassed because they brought their concerns to HCR's headquarters, that a corporate official—probably Millspaugh—would visit Heartland to look into their concerns, and that HCR would advise the three of the results of that investigation. And, indeed, over the next couple of months Millspaugh did look into the circumstances at Heartland.

*Millspaugh's "Audit" of Heartland*

Millspaugh's investigation had two major results.

One was that Heartland increased the pay of its aides, and hired more aides. Millspaugh determined, that is, that the three nurses' contentions about Heartland's employment of an insufficient number of aides was correct.

The other principal result of Millspaugh's investigation is that HCR fired Cordrey, Goldsberry and Wells.

*Millspaugh's meeting with Heartland's department heads.* Less than a week after Cordrey, Goldsberry and Wells journeyed to Toledo, Millspaugh met with the Heartland's department heads. (Stabile was not present.) By then Millspaugh had heard about high levels of tension and employee dissatisfaction within Heartland. As a group the department heads liked Stabile, they knew about the trip by the three nurses to Toledo, they assumed that the nurses had criticized Stabile's management of Heartland, and they assumed that Millspaugh might have

in mind removing Stabile as administrator of Heartland. They accordingly presented a paper to Millspaugh that stated their support for Stabile. Several department heads spoke in general terms about problems resulting from unprovoked hostility toward management on the part of some employees. During the discussion at least one department head specifically referred to "unprofessional" behavior by Cordrey, Goldsberry and Wells.

Millspaugh responded by asking each person at the meeting to list the names of anyone associated with Heartland whom he or she believed might be responsible for the tension in the facility, "people that were kind of maybe making it a little bit harder . . . to maintain that teamwork effort." When Millspaugh collected the papers, he found that Cordrey's and Wells' names were on every slip of paper, and Goldsberry's was on many. A few other employees were named, but not as often as any of those three.

That meeting was the turning point for Millspaugh's investigation. From then on Millspaugh went forward with the thought that Cordrey, Goldsberry and Wells probably had a major hand in the "negativism" (as he called it) that, Millspaugh believed, was damaging Heartland. If the department heads had not mentioned Cordrey, Wells or Goldsberry at that meeting in January, in fact, it is unlikely that any of the three would have been fired.

*Millspaugh's discussions with Stabile.* Neither Cordrey, Goldsberry nor Wells liked Stabile and, predictably, Stabile reciprocated those feelings. Millspaugh's investigation into Heartland's problems led him to discuss Heartland's situation with Stabile, of course, and she commented to Millspaugh about the



three nurses' lack of cooperation with management, referring particularly to the pharmacy change. "They were very vocal about not wanting the pharmacy change," Stabile said, and they complained to Stabile about the extra paperwork it meant for them.

Stabile also told Millspaugh that unnamed employees had committed various improprieties. For example Stabile told Millspaugh: that she had heard that some nurses had communicated inappropriatelly with residents and their families about the pharmacy change; that the daughter of an A-the pharmacy change; that the daughter of an A-wing resident (A wing is where Cordrey, Goldsberry and Wells worked) had told Stabile that she had heard that Heartland employed an insufficient number of aides; that some Heartland employees had started rumors about an illicit romance between Millspaugh and Stabile and about Heartland saving money by turning off the heat at night; and that on several occasions during the course of the shifts that "these ladies" worked, Stabile had gotten hate notes under her door. It was evident that Stabile believed that Cordrey, Goldsberry and Wells were at the bottom of all these events, and Millspaugh came away from the conversation assuming that Cordrey, Goldsberry and Wells were in fact the culprits.

*Millspaugh's meetings with employees.* As part of Millspaugh's "audit" of Heartland, in mid-January he met with the facility's employees, group by group (nurses, aides, and so on). It seemed to Millspaugh that there was a tenseness, a hostility toward management, among the aides that there wasn't among, say, the housekeeping personnel, and that among the aides that tenseness was most pronounced among the aides who worked the second shift (3:00 to 11:00

p.m.). Moreover those second shift aides complained about the pharmacy change, a change that, to Millspaugh, aides should not have cared about. There were, obviously, all sorts of possibilities why the second shift aides might have voiced the feelings they did. But given the information that Millspaugh had gotten from the department heads and from Stabile to the effect that Heartland's problems centered around Cordrey, Goldsberry and Wells, what Millspaugh heard from the aides sounded to him like additional evidence that Cordrey, Goldsberry and Wells were at the heart of the tension at the facility.

*Other facets of Millspaugh's investigation.* By mid-January Millspaugh clearly had, in his own mind, built a case against Cordrey, Goldsberry and Wells. He did not, however, take any action against them. Instead, he continued to look into Heartland's problems and to talk to persons associated with Heartland about those problems. He spoke individually with some of the department heads, with the facility's office staff, with ex-employees, and had further talks with Stabile. Either because of what they said or, just as often, what Millspaugh led himself to believe based on what they said, he concluded that: a local physician had stopped referring patients to Heartland because of what Cordrey, Goldsberry and Wells had been saying to him; Cordrey had an unusually bad attendance record, and Wells' was almost as bad; Cordrey and Wells without adequate excuse missed a mandatory instructional meeting; during a recent period Wells had made a "horrendous" number of medical documentation errors; Cordrey and Wells had been criticizing Heartland to the residents of the facility and out in the Urbana



community; the three kept talking about Stabile's unfairness; Cordrey and Wells had urged Heartland's medical director (who was not a Heartland employee) to question the pharmacy change; and Cordrey and Wells were "insubordinate," they were "used to getting their own way" and wanted to keep things that way.

*The events of March 2.* Millspaugh met with Heartland's nurses on March 2. His main purpose in calling the meeting was to discuss three topics: (1) Heartland was increasing the aides' pay and would be actively seeking to hire more aides; (2) Stabile would be staying on as administrator; and (3) Heartland was not going to switch back to Village pharmacy. Had the meeting been a relaxed, friendly one, that might have been the end of the matter. But it was not. In Millspaugh's words (which I credit):

> the demeanor and tone of the meeting . . . was one of resistance to change, emphatic refusal to get on board and make Heartland of Urbana a good facility . . . there was nothing showing me that there was going to be anything different from what it had been in the past.

Millspaugh had met with Cordrey, Goldsberry and Wells just prior to the March 2 nurses' meeting to tell them, in advance, what the nurses' meeting was going to be about. (Millspaugh did that because he was going to announce at the nurses' meeting the results of his investigation. Cordrey, Goldsberry and Wells were entitled to advance notice, Millspaugh felt, because the three were the ones who had brought about that investigation by their trip to headquarters on January 11). Two parts of the conversation at

this pre-meeting are worth noting. One is that Millspaugh said that he had heard a rumor that the nurses were planning a walk-out. But the rumor was entirely erroneous, the three nurses said so, and Millspaugh believed what they said. The other is that when Millspaugh said that Stabile would be staying on as administrator, he went on to say that Stabile had come to understand that, for Heartland to operate effectively, she had to work cooperatively with the nurses. Cordrey responded: "well, it hasn't helped."

Cordrey had made arrangements to leave before the end of the nurses' meeting. Millspaugh interrupted the meeting when Cordrey left, followed her out, and spoke privately with her for a few moments. The conversation went something like this:

Millspaugh: There are problems at Heartland, Cindy, and I think you're part of those problems. I'd like to see you become part of the solution.

Cordrey: Are you firing me?

Millspaugh: No. What I'm asking you to do is to become part of the team and to become part of the solution to the problems here.

Cordrey: I am not part of the problem.

Millspaugh: Cindy, you'd better think about getting another job—I think you should resign.

Millspaugh returned to the meeting; Cordrey left the building.

By March 2—actually, long before March 2—Millspaugh had concluded that Cordrey, Goldsberry and Wells were a central cause of the tension and morale problems at Heartland. To Millspaugh, therefore, the hostility he felt at his meeting with the



nurses, Cordrey's "well, it hasn't helped" remark about Stabile (during Millspaugh's pre-meeting conversation with the three nurses), and Cordrey's denial that she was a "part of the problem," were the last straws. He decided that HCR should fire Cordrey, Goldsberry and Wells.

*HCR fires Cordrey, Goldsberry and Wells.* In the days following March 2 Millspaugh told Possanza (the HCR vice-president), Stabile, and Stabile's immediate superior, that he though that Cordrey, Goldsberry and Wells should be fired. They all agreed. On March 14 Stabile told Cordrey and Wells that they either had to resign or they would be fired. They refused to resign and Stabile did fire them. On March 16 Stabile told Goldsberry the same thing. Goldsberry resigned.

*Did HCR Fire Cordrey, Goldsberry And Wells Because Of Their Protected Activity*

I consider the meeting that Cordrey, Goldsberry and Wells had in Toledo with Possanza and Millspaugh to be protected activity. But I am convinced that Millspaugh did not hold the three nurses' trip to Toledo against them. I make that finding even though Millspaugh's basis for firing Goldsberry and Wells is not wholly logical, based even on Millspaugh's own testimony. In particular, the final factor that led Millspaugh to urge that Cordrey, Goldsberry and Wells be fired was his private conversation with Cordrey. And neither Goldsberry nor Wells was mentioned in that conversation, or even referred to. Beyond that, as I read the record it should have been apparent to Millspaugh that Goldsberry had expressed considerably less hostility toward Heartland's management than had either Cordrey or Wells.

That suggests that Millspaugh, in his own mind, simply lumped together the activities of the three. Certainly one reason he might have done that was their joint trip to Toledo. But throughout Millspaugh's investigation, numerous people with whom he spoke referred to Cordrey, Goldsberry and Wells in one breath. The probability is that it was those conversations that led Millspaugh to think of the three nurses as a kind of single unit, not the nurses' trip to Toledo.

That, however, does not end the discussion about whether HCR fired the three nurses because of their meeting with HCR's management in Toledo or whether the nurses were discharged because of other protected activity.

*The basis of criticisms of the three nurses by Heartland supervisors to Millspaugh.* On a number occasions various Heartland supervisors spoke disparagingly of Cordrey, Goldsberry and Wells to Millspaugh. Absent that criticism of the three nurses by those supervisors, the three would not have been fired. That raises the question of whether the supervisors disparaged Cordrey, Goldsberry or Wells to Millspaugh because of the nurses' protected activity.[8]

Cordrey, Goldsberry and Wells on several occasions engaged in protected discussions among themselves and with other Heartland employees. They tried, concertedly, to meet with Stabile. And they did meet with Possanza and Millspaugh. But they also griped to Stabile and other supervisors in ways and about subjects that the Act does not protect, com-

[8] Some evidentiary questions inherent in that issue were discussed during the course of the hearing, at tr. 1560-63.



plained about Heartland to other employees with no thought of pursing concerted action, and complained about such matters as the pharmacy change and Heartland's employment of an insufficient number of aides to residents and to members of the residents' families.

As I evaluate the record, it is too sparse (notwithstanding its many exhibits and 1,800 pages of transcript) to permit me to determine whether the Heartland supervisors made those criticisms of Cordrey, Goldsberry and Wells to Millspaugh solely because of the three nurses' unprotected activity, or whether those criticisms stemmed partially from the nurses' protected activity.[9]

*Meetings of employees called by management.* Millspaugh twice called Heartland's nurses to meetings, the first time on January 18, the second on March 2.

At the January meeting various nurses complained about matters like the insufficient number of aides, the pharmacy change, and inadequate equipment. Those complaints amounted to protected activity. *Whittaker Corporation*, 289 NLRB No. 116 (July 18, 1988). But that meeting played no part in HCR's discharge of Cordrey, Goldsberry or Wells, and I will not consider it further.

[9] Cordrey, Goldsberry and Wells participated in employee activities that eventuated in the three carrying a letter critical of Heartland's management to the Department of Health of the State of Ohio. The A.D.O.N. was invited to join in those activities. But neither Millspaugh nor Stabile nor any other Heartland supervisor who participated in any way in the events leading to the discharges of Cordrey, Goldsberry or Wells ever learned of those activities.

Millspaugh's meeting with Heartland's nurses on March 2, his pre-meeting get-together with Cordrey, Goldsberry and Wells on that day, and his private discussion on that day with Cordrey have all been discussed as have my findings that Cordrey's criticism of Stabile at the pre-meeting and her "I am not part of the problem" statement played a role in Millspaugh's decision to fire Cordrey, Goldsberry and Wells. But I do not consider either of those two remarks to be protected by the Act.

A more difficult question is raised by the fact that Millspaugh based his decision to fire Cordrey, Goldsberry and Wells in part on the "demeanor" of the assembled nurses at the March 2 meeting. And by "demeanor" Millspaugh was referring to body posture (cross arms and legs, for example) and facial expressions (angry, irritated looks).

At the meeting Millspaugh told the nurses that the pharmacy change they did not like would remain in place, that Stabile would continue on as administrator, and that anyone who could not accept those decisions should leave Heartland. The demeanor of the nurses attending the meeting surely stemmed from those statements by Millspaugh and from the nurses' generalized disapproval of HCR's management of Heartland.

Had the nurses verbally expressed their opposition to Millspaugh, their statements probably would have been protected by the Act. See *Whittaker Corporation*, above; *The Hoytuck Corp.*, 285 NLRB 120, fn. 3 (1987). But it would be stretching things to conclude that the nurses' non-verbal expression was protected by the Act, particularly since there is no indication that the nurses intended that their body pos-



tures and facial expressions seen by Millspaugh as communication.

There is one last matter to consider regarding the discharges of Cordrey, Goldsberry and Wells. That is, the protected activity of Cordrey, Goldsberry and Wells in meeting with HCR's management in Toledo on January 11 led to their being fired.

Millspaugh undertook his investigation into Heartland's circumstances because of what Cordrey, Goldsberry and Wells said about Heartland at their meeting with management in Toledo. Absent that trip to Toledo by the nurses, that is to say, no such investigation would have been conducted. And it was Millspaugh's investigation of Heartland that resulted in Millspaugh's recommendation that HCR discharge the three. Had there been no investigation, Cordrey, Goldsberry and Wells might well still be working at Heartland.

Arguably, if the Board permits protected activity to have that kind of deleterious impact on employees, employees will feel less free to engage in protected activity. It seems to me, however, that there were too many links in the causal chain connecting the Toledo meeting with HCR's discharges of the three nurses for the Board to conclude that HCR fired the nurses "because" of their protected activity."

I accordingly conclude that the General Counsel has failed to prove that HCR discharged Cordrey, Goldsberry or Wells because of employee activity that the Act protects.

## III. *The Written Warnings That HCR Issued To Cordrey, Wells And Thatcher*

On February 27 Stabile handed Cordrey three written warnings, and gave Wells four. Stabile gave two written warnings to nurse Connie Thatcher on February 23 and another on March 10. The General Counsel alleges that HCR issued all of those warnings because of the nurses' protected activity rather than for the reasons stated in the warnings. My conclusion is that HCR's issuance of warnings to Cordrey and Wells about missing an "inservice" did violate the Act, but that HCR's issuance of the other warnings did not.

### *The Warnings About Improper Documentation*

Thatcher and Cordrey each received a notice of a "verbal warning" for having made 14 and 20 errors, respectively, in their January 1989 records of their treatment of residents. Wells received a "written warning" (which is more serious) for 44 such errors. In all three cases the warnings were dated February 15.

Much of Heartland's revenue comes from the State of Ohio and from the Federal government on behalf of individual residents, rather than from the residents themselves, as a result of Medicaid and Medicare reimbursements and the like. The State of Ohio, however, reduces such payments to the extent that the treatment that Heartland furnishes to any resident is not properly documented. At least in part because of that threat of reduced revenues, Heartland generally employs a "patient assessment" nurse (PAS nurse) whose sole job is to check the patient records written by Heartland's other nurses. When



Heartland's PAS nurse comes across a record that is inadequate or incorrect she either corrects it herself or tells the nurse who wrote the record to correct it.

On February 7, 1989, the State of Ohio notified Heartland that on the following day a State patient assessment team was going to audit Heartland's records for the months of November, December, and January. Heartland's management did not consider that to be wonderful news, particularly since during the latter part of that period Heartland had no D.O.N. and no PAS nurse. HCR responded by having five relatively senior personnel check Heartland's records, trying to find and correct errors in the too few hours available to them before the State's auditing team arrived. "Frantic" is the adjective that comes to mind.

Those HCR personnel began their review by examining the A wing's records. It turned out that they never did have time to get to B wing. And what they found in their search through A wing's records was an enormous number of errors by the nurses who worked on that wing.

Many of the errors were of the minor, technical, variety. And if those errors had come to management's attention in the normal course of events, little would have been said about them. But the circumstances here were not at all normal (given the State's audit), with the result that, because of those documentation errors, Stabile disciplined each of the A wing nurses. Some of the nurses (including Goldsberry) merely got a talking to. As indicated above, Cordrey, Thatcher and Wells got written disciplinary notices. They were the only nurses to receive such notices in the aftermath of the State's inspection.

In some respects Heartland behaved unfairly in handing out those written disciplinary notices. Heartland's nurses had come to expect that a PAS nurse would handle any errors that they might make; some of the errors were so technical that the nurses didn't consider them to be errors at all; and at the hearing neither Stabile nor Cooper (the D.O.N.) was able to convincingly explain why some nurses had gotten written disciplinary notices and some had not.

The General Counsel points to that unfairness and argues that it proves that HCR handed out those disciplinary notices for unlawful reasons. But my conclusion is that what it proves is that the episode was enormously unsettling to Stabile—it showed, after all, that there had been a serious management failure —and that it led her to lash out without fully thinking through what corrective action would be appropriate. It is worth noting, moreover, that Goldsberry, who in January had travelled to Toledo with Cordrey and Wells to complain about Stabile's management, did not receive a disciplinary notice about her errors; while Thatcher, who had not participated in that meeting, did.

*HCR's Discipline Of Cordrey And Wells For Missing An "Inservice"*

From time to time Heartland puts on training sessions for its nurses. Heartland calls those sessions "inservices." Some inservices are "mandatory," some are not. One of the aftermaths of the documentation problems unearthed in connection with the State's audit (as just discussed) was a mandatory inservice on documentation that Heartland held for its nurses on February 16.



Of Heartland's dozen or so nurses, only six attended the inservice. That led a number of HCR supervisors to conclude that at least some of the nurses who did not attend stayed away concertedly. ("Blue flu" was the term that the supervisors used among themselves in referring to the absences.)

Cordrey and Wells were among the nurses who did not attend. They received written disciplinary notices for their failure to attend. None of the other nurses who missed the meeting received any written discipline. (Goldsberry did not attend. But that was because she was on duty. Thus the fact that Heartland did not discipline Goldsberry for not attending the inservice is beside the point.)

Stabile's decision to issue disciplinary notices to Cordrey and Wells because of their failure to attend the inservice is peculiar in a number of respects.

The first is that Heartland failed to comply with its own policies in respect to the notice of the meeting that it gave to the nurses. That policy promises at least two weeks' notice of any mandatory inservice. Heartland gave the nurses only a few days' notice of the February 16 inservice.

Secondly, Cordrey was not on duty at Heartland at any time in the period between the announcement of the inservice and the inservice itself. Heartland's D.O.N. tried to telephone Cordrey to advise of the inservice but never reached her. So Cordrey was never officially notified of the inservice. (Cordrey did learn about it from other nurses, however.)

Thirdly, in advance of the inservice both Cordrey and Wells advised management that they could not attend it. Cordrey called the D.O.N. to say that her daughter was very sick and that the inservice con-

flicted with a doctor's appointment. Wells turned in a note the day before the inservice that advised that she "may not be able to attend meeting" because "sons both ill." In contrast, Thatcher, who was out sick, was not disciplined for failing to attend the in-service. Nor was nurse Karen Froebe, who had asked to be excused from the inservice in order to take her son to a dentist.

It seems to me that HCR's discipline of Cordrey and Wells for having missed the inservice was related to the supervisors' belief about the "blue flu." That is, I find that Stabile concluded that the reasons that Cordrey and Wells gave for missing the inservice were untrue, that the actual reason that they missed the inservice was to concertedly protest management's treatment of Heartland's nurses, and that that reason for missing the inservice did not amount to an acceptable excuse.

Cordrey and Wells, of course, deny that they engaged in any such protected activity. But that is immaterial. (In fact I need not, and am not going to, determine whether to credit their denials.) An employer violates the Act if it disciplines an employee because of its belief that the employer engaged in activity of the kind that the Act protects, whether or not the employer is correct in that belief. *Mashkin Freight Lines*, 261 NLRB 1473, 1476 (1982).

Here HCR did not discipline Cordrey and Wells for what HCR believed was their concerted activity. Rather, HCR disciplined Cordrey and Wells for their absence from the inservice on the ground that what Stabile believed to be their concerted protest was not a proper excuse for missing the meeting. But as far as the Act is concerned, that is a difference without



meaning. See, *e.g.*, *Go-Lightly Footwear*, 251 NLRB 42 (1980).

The more difficult question is whether this issue was litigated. In particular, the General Counsel's brief does not argue that HCR violated the Act in the manner I have just outlined.

But the complaint specifically alleges that HCR issued written warnings to Cordrey and Wells because they engaged in protected activity "and/or because Respondent believed they did so." (See, in regard to the relative importance of complaint and brief in delineating issues, *Louisiana-Pacific Corp.*, 299 NLRB No. 5 (July 13, 1990).) And the facts about management's belief about the "blue flu" are uncontested.[10]

I accordingly conclude that HCR violated Section 8(a)(1) of the Act when it concluded that Cordrey and Wells concertedly determined to miss the January 16 inservice as a protest of the management of Heartland and, because they missed the inservice, disciplined them.

I have considered whether the discipline HCR meted out to Cordrey and Wells regarding the inservice played any part in HCR's decision to fire the

---

[10] I established a briefing schedule that that gave HCR an opportunity to file a reply brief (an opportunity that it utilized) because of my concern about the lack of clarity, as of the end of the hearing, about what protected activity the General Counsel was contending that Heartland's employees engaged in. But issues relating to management's beliefs about employee activities had no bearing on the discussion about briefing schedules. In any case, the General Counsel's brief (at page 17) does contend that HCR's supervisors "were somehow convinced that the nonattendance at the in-service training was . . . some sort of concerted action."

two nurses, or whether the belief on the part of HCR supervisors that Cordrey and Wells concertedly absented themselves from the inservice was a cause of their discharges. But I conclude that neither was the case. Or, in *Wright Line*'s terms,[11] I conclude that the record shows that HCR would have fired Cordrey and Wells even had HCR not held that belief and not disciplined the nurses for missing the inservice.

*HCR's Discipline Of Thatcher Regarding Assignment Of Aides*

On March 9 Heartland's D.O.N., Cooper, told the nurses that henceforth they would be required to assign aides to particular residents. Cooper described the criteria that she wanted the nurses to apply in drawing up the assignments. Thatcher had trouble that night in following Cooper's instructions. That, in turn, led to "turmoil" among the aides on Thatcher's shift. Cooper responded by disciplining Thatcher for not following Cooper's instructions.

That disciplinary action seems a bit abrupt, especially when compared to Heartland's usual disciplinary practices. But at the hearing I got the impression that Cooper is an abrupt kind of person. All in all, the record fails to indicate anything other than that the only reason that HCR issued Thatcher that March 10 disciplinary notice is the reason stated in the notice—"inappropriate" aide assignments.

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[11] *Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).



*HCR's Discipline Of Cordrey, Thatcher And Wells For Excessive Absences*

According to Hearland's "Absence Policy":

> The following occurrences may constitute excessive absenteeism. . . .
>
> (1) Two (2) absences in a month or 6 absences in a 12 month period.
>
> * * *

In Heartland's parlance, an "occurrence" is any day or consecutive group of days during which HCR would have scheduled the employee to work but for the absence, whether or not the absence was for a valid reason. Thus, for example, being out sick for two weeks in a row would constitute one occurrence.

At the start of the period of concern to us here, Heartland's supervisors routinely ignored that policy. But when Cooper arrived at Heartland, she re-implemented it. That led to Cordrey, Thatcher and Wells receiving disciplinary notices because of "excessive absences."

There were some anomalies in those disciplinary actions. (For example, one of Cordrey's "occurrences" as stated in her disciplinary notice was her absence when she attended the funeral of her father-in-law. Yet funeral leave is a specified HCR employee benefit.) But my conclusion is that the disciplinary notices that HCR issued to Cordrey, Thatcher and Wells for "excessive absences" were nothing more than that; they had nothing to do with the employees' protected activities.

*Wells' Discipline For An "Unexcused Absence"*

Stabile needed someone to work from 7:00 p.m. until 11:00 p.m. or midnight on February 3. On January 30 she talked to Wells about it. Wells agreed to work those hours, subject to certain pre-conditions being fulfilled by Stabile. Stabile agreed to those pre-conditions. But things went awry. Stabile may have misunderstood Wells when Wells described those pre-conditions. Or Stabile or Wells may have misremembered what the agreement was.

The result was that Stabile proceded to fulfill what she believed (rightly or wrongly) her agreement with Wells to be and counted on Wells to work on the night of February 3. But on the morning of February 3 Stabile got a note from Wells saying that since Stabile hadn't met the pre-conditions discussed on January 30, she was not going to work that night.

As far as Stabile was concerned, Wells had reneged, leaving Heartland in the lurch. Stabile accordingly disciplined Wells because Wells had not worked on a shift that she had "committed" to work, without an "acceptable excuse." Moreover Stabile treated Wells' failure to work on the evening of February 3 as an "absence." That led Stabile to issue a second disciplinary notice, this one for being absent too often (twice in one month—February 3 and on another date in February).

Wells was outraged. And it's easy to see why. But I find that Wells' protected activity had nothing to do with Stabile's disciplining of Wells.



Remedy

The recommended Order requires HCR to cease and desist from its unlawful actions and to take the usual affirmative action in remedying the unlawful action it did take, including removing from any files it may still keep on Cordrey and Wells any reference to its unlawful discipline of them.

ORDER [12]

The Respondent, Health Care and Retirement Corporation of America, Inc., d/b/a Heartland of Urbana, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Issuing disciplinary notices to employees because the employees, for purposes protected by Section 7 of the Act, concertedly refuse to attend a meeting called by HCR.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If HCR maintains any files pertaining to Cynthia Cordrey or Ruby Wells, remove from such files any reference to the disciplinary notices issued

[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

to Cordrey and Wells concerning their absence from an inservice on February 16, 1989, and notify Cordrey and Wells that this has been done and that the notices will not be used against them in any way.

(b) Post at its Urbana, Ohio, facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by HCR's representative, shall be posted by HCR immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. HCR shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps HCR has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismised insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 22, 1990

/s/ Stephen J. Gross
STEPHEN J. GROSS
Administrative Law Judge

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[13] If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this Notice.

WE WILL NOT discipline you if, for reasons protected by Section 7 of the Act, you concertedly refuse to attend a meeting we have called.

WE WILL NOT in any like or related manner interfere with, restraint or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from any of our files that pertain to nurse Cynthia Cordrey or nurse Ruby Wells any reference to the disciplinary notices that we issued concerning their absence from an inservice, and we will notify Cordrey and Wells that this has been done and that the disciplinary notices will not be used against them in any way.

Health Care And Retirement
Corporation Of America, Inc.
d/b/a Heartland of Urbana

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271 Telephone (513) 684-3663.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60297

No. 92-1964



IN THE

# Supreme Court of the United States

October Term, 1992

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## RULE 29.1 STATEMENT

Respondent Health Care and Retirement Corporation of America is a wholly owned subsidiary of Health Care and Retirement Corporation. Respondent does not have any non-wholly owned subsidiaries.

## TABLE OF CONTENTS

## TABLE OF CITATIONS



**Statutes Cited:**



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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Health Care and Retirement Corporation of America ("HCR") respectfully prays that this Court deny the writ of certiorari and dismiss the petition.

## STATEMENT OF THE CASE

This case arises out of the discipline and/or discharge of four nurses employed by HCR at a nursing home in Urbana, Ohio. The General Counsel of the National Labor Relations Board ("the Board") claimed that the disciplinary action violated §8(a)(1) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(a)(1). Respondent defended on the grounds that the nurses were supervisors and thus not entitled to the protection of the Act and that the disciplinary action was taken for legitimate reasons, not as a result of any protected activity.

After eight days of hearing, an ALJ concluded that "in common parlance" the nurses are supervisors because they give orders to the nurses' aides which the aides follow and because the nurses are in charge of a wing of the facility. The ALJ determined that the nurses were nonetheless employees, not supervisors, because the Board's definition of supervisor "is different from Webster's." (App. 48a). The ALJ also found that Respondent did not discharge the nurses because they engaged in protected activities.[1] Both parties filed exceptions to the ALJ's decision.

The Board upheld, without analysis, the ALJ's conclusion that the nurses are employees. Rejecting the ALJ's findings of fact and credibility determinations, the Board further concluded that Respondent violated §8(a)(1) of the Act by discharging and/or disciplining the nurses.

[1] The ALJ also concluded that Respondent's issuance of written warnings to three nurses for improper documentation, improper assignment and excessive absences did not violate the Act. He did determine, however, that Respondent's issuance of written warnings to two nurses for missing an in-service violated the Act.



The Sixth Circuit Court of Appeals vacated the Board's order, concluding that the nurses were supervisors within the meaning of the Act because they assigned work to and directed the work of subordinate employees, *i.e.*, nurses' aides. The Court did not reach the issue of whether the nurses performed any of the other functions listed in §2(11) of the Act.[2]

[2] Having determined that the nurses were supervisors, the Court also did not address the propriety of the Board's rejection of the ALJ's conclusion that the nurses were not disciplined or discharged as a result of any protected activities.

## REASONS FOR DENYING THE WRIT

### I. This Is Not An Appropriate Case To Address The Issues Presented.

Petitioner contends that this case is appropriate for review because the Sixth Circuit rejected Petitioner's position that the definition of "supervisor" in Section 2(11) of the Act is narrowed when applied to health care employees. Respondent agrees that the Board and the Sixth Circuit apply the statutory standard differently. Respondent also recognizes that other circuit courts of appeals, presented with different facts, have deferred to the Board's approach. The purported conflict can not, however, be resolved in this case.

The issue upon which the Board and the Sixth Circuit differ is whether nurses who meet the statutory definition of supervisor because they assign work to and direct the work of subordinate employees are nonetheless disqualified from being supervisors because the activity they supervise involves patient care. Because that issue was not dispositive in this case, *i.e.*, the nurses also performed other supervisory functions listed in the statute,[3] this case does not adequately present the issues asserted and the petition should be denied. *Ramsey v. New York*, 440 U.S. 444 (1979); *McClanahan v. Morauer & Hartezell, Inc.*, 404 U.S. 16 (1971). *See Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).

The Act defines a "supervisor" as one who has authority, in the interest of the employer to assign, reward or discipline other employees, responsibly to

[3] The Board applies its "patient care" exception only when nurses' supervisory status is based upon their assignment and direction of subordinates' work. The Board concedes that nurses with the authority to reward or discipline subordinates, or effectively to recommend the same, are supervisors.



direct them, or "effectively to recommend such actions." 29 U.S.C. §152(11). The Board concedes that respondent's nurses assign work to and direct the work of the nurses' aides. The Board, however, ignores the fact that the nurses also play a crucial role in the disciplinary and evaluative processes in the facility.[4]

Respondent's nurses routinely counsel aides when they observe inappropriate behavior or poor performance on their shift (App. 43a). When they deem it appropriate, the nurses also complete written counseling forms or written warning notices respecting the aides' performance. These notices are maintained in the employee's personnel file and can be relied upon for additional discipline in the future. The nurses also report to management on problems with the aides' work and may recommend a penalty to the director of nurses or the facility's administrator. The ALJ recognized that these reports can "have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." (App. 44a).

The nurses also complete both probationary and annual evaluations to assess the performance of and give progress reports to employees. In completing the evaluations, the nurses rely on their daily observation of an aide's work performance and their own judgment

[4] The Board also ignores the secondary criteria it has identified as important in determining supervisory status, including job descriptions and ratio of employees to supervisors. The nurses' job description indicates that they are responsible for overall management and supervision of their units. They are specifically required to assign and direct the aides' work and to appraise the quality and quantity of the aides' performance. Moreover, if the nurses are not supervisors, the ratio of employees to supervisors in the nursing department is 30 to 1. Even the Board must concede that such a ratio is unreasonable.

regarding the quality of the aide's work. These performance evaluations become a part of the employee's permanent personnel file.[5]

The nurses at Heartland of Urbana clearly have the authority "effectively to recommend" rewards and discipline. Although they may not actually calculate raises or discharge employees, they are responsible for initiating and following through both the evaluative and disciplinary processes and their written statements are part of the employees' record.

The nurses' disciplinary and evaluative functions alone render them supervisors under the Act. The Court need not decide, therefore, whether their assignment and direction duties are sufficient to confer supervisory status. Under these circumstances, the questions presented by the petition are "purely artificial and hypothetical" and would result in the Court rendering an advisory opinion. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).[6]

[5] Respondent presented evidence at the hearing that the nurses complete all portions of the written evaluation form, including the section entitled "Overall Evaluation". The alleged discriminates testified, however, that they were instructed not to complete that portion of the form (App. 45a).

[6] The issues the Board raises herein are also raised in another Petition for Writ of Certiorari pending in this Court. *See Visiting Homemaker and House Services, Inc. v. National Labor Relations Board*, Case No. 92-1799, Petition for Writ of Certiorari filed May 11, 1993. The *Homemaker* case may be a more appropriate vehicle for addressing the issues the Board raises.



**II. The Sixth Circuit Correctly Concluded That There Is No Exception In The Act For Health Care Workers.**

Under the Act a supervisor is "*any* individual having authority, in the interest of the employer, to . . . transfer, . . . assign, other employees or responsibly to direct them . . ." 29 U.S.C. §152(11) (emphasis added). The Board has itself recognized that only one of the powers listed in §2(11) need be present to establish supervisory status. *Phelps Community Medical Center*, 295 NLRB 486 (1989). The Board nevertheless takes the position that nurses who assign work to and direct the work of aides or other subordinates cannot, without more, be statutory supervisors. Indeed, the Board appears to take the position in its petition that all professionals are exempt from supervisory status.[7]

According to the Board, when nurses direct the work of nurses' aides or other subordinates, they act in accordance with professional norms, and thus not "in the interest of the employer." The Board made a similar argument respecting managerial employees in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). This Court recognized in *Yeshiva* the tension between the Act's exclusion of managerial employees and its inclusion of professionals, "since most professionals in managerial positions continue to draw on their special skills and training." That same tension exists with respect to supervisory employees. That tension cannot be resolved,

[7] This is a new argument; Petitioner did not even raise in the Court of Appeals the interplay between the Act's coverage of professional employees and its exclusion of supervisors.

however, by excluding from supervisory status all those who act in accordance with professional norms. *Yeshiva*, 444 U.S. at 687.[8]

The Board also contends that nurses who supervise aides act in the interest of the patient rather than in the interest of the employer. In *Yeshiva*, the Board argued that in formulating and making policy for the university, faculty members acted primarily in their own interest, not the interest of their employer. This Court recognized that the faculty's professional interests could not be separated from those of the institution. 444 U.S. at 688. As the Court noted, "the 'business' of a university is education," and "the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal." *Id.* The Sixth Circuit has made similar observations with respect to nurses:

> Contrary to the assertions of the Board, nurses with [supervisory] responsibility are not disqualified from being supervisors simply because their duties largely involve "mere patient care." Patient care, or "mere patient care", in the Board's phraseology, is the business of a nursing home.

*NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 976 (6th Cir. 1987).

[8] Contrary to Petitioner's claim, this Court's favorable citation in *Yeshiva* to *Doctor's Hospital of Modesto, Inc.*, 183 NLRB 950, 951-52 (1970) *enf'd* 489 F.2d 772 (9th Cir. 1973) does not evidence this Court's approval of the Board's "mere patient care" distinction. The *Modesto* case involved a hospital, not a nursing home. Moreover, there were several layers of supervisors in the nursing department in *Modesto*. Those intermediate levels do not exist at Respondent's facility.



Congress recognized, in excluding supervisors from coverage under the Act, that employers require the undistracted allegiance of employees in key positions. *Florida Power & Light Co. v. International Brotherhood of Electrical Workers*, 417 U.S. 790, 806 (1974). Respondent's business operates 24 hours a day, 365 days per year. Its nurses are the only supervisory employees at the facility for a large part of every day and all weekend.[9] To ensure that its business is run properly, Respondent has vested its nurses with supervisory authority, and relies upon them to exercise it.

Respondent does not suggest that nurses in nursing homes are always supervisors within the meaning of the Act; each case must be decided on its facts.[10] The Board's rule, however, would exclude all but a few health care workers from supervisory status. This standard is simply not consistent with the Act and is not entitled to judicial deference. *Yeshiva*, 444 U.S. at 691; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978).

[9] The ALJ was "greatly troubled" by the fact that if the nurses are not considered supervisors, there is no one acting as a supervisor in the evening and on weekends, and there is a 30:1 ratio of employees to supervisors in the nursing department (App. 46a-48a).

[10] The determination of supervisory status is fact intensive and the cases cited by the Board are distinguishable on their facts from this case.

**III. Because The Allocation Of The Burden Of Proof Was Not Determinative In This Case, It Is Not An Appropriate Basis For Review.**

The Board concedes that the allocation of the burden of proof was not determinative in this case. Petition for Certiorari at 20, n.13. Although the Board concluded that Respondent had the burden of proving supervisory status, the Board states that "the preponderance of the evidence establishes that the nurses are employees." (App. 13a).

The Sixth Circuit, while holding that the Board had the burden of proof on this issue, concluded that "there is substantial evidence to support HCR's claim that the LPN's are, in fact, supervisors." (App. 9a).

Under the facts of this case, the issue of who bears the burden of proof is not outcome determinative. This case is not, therefore, appropriate for review of the burden of proof issue.



## CONCLUSION

The Petition for Writ of Certiorari should be denied because this case does not present appropriate facts to address the questions presented.

Respectfully submitted,

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No. 92-1964

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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*National Labor Relations Board*
*Washington, D.C. 20570*

## TABLE OF AUTHORITIES

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 92-1964

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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**REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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1. Respondent "recognizes" that other courts of appeals have "deferred to the Board's approach" that a nurse's direction to less-skilled employees in the exercise of professional judgment does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (the Act), 29 U.S.C. 152(11). Br. in Opp. 4. Respondent also "agrees" that the Sixth Circuit has rejected that aspect of the Board's standard for determining whether a nurse is a supervisor. *Ibid.* Nevertheless, respondent urges this Court to leave the conflict unresolved. Respondent suggests that the issue is not squarely presented here, because, even if the court of appeals incorrectly held that the nurses in this case

are supervisors by virtue of directing nurses' aides, the nurses could be found to be supervisors under another branch of Section 2(11) because they "play a crucial role in the disciplinary and evaluative processes in the facility."[1] Br. in Opp. 5.

That suggestion is incorrect; respondent's purported alternative basis for treating the nurses as supervisors is unsupported by the record and findings in this case. The administrative law judge (ALJ) considered each of the areas of the nurses' activity on which respondent relies (Br. in Opp. 5-6)—counseling nurses' aides; participating in evaluations; and recommending rewards and disciplinary measures—and, after extensive discussion, the ALJ rejected the claim that those activities add up to discipline or evaluation under the Act.

While the ALJ found that a nurse at respondent's facility may use a counseling form to note problems concerning the aides' work performance, he further found that the "record contains no indication that the counseling forms that the nurses drafted have ever had a deleterious impact on any aide." Pet. App. 44a. And, while the ALJ found that "nurses routinely report problems about an aide's work or attendance" to superiors, the "[n]urses themselves do not penalize any aide or threaten any aide with future penalties," and "with only minor exception the nurses do not recommend that any aide be penalized." *Id.* at 44a-45a. Finally, the ALJ found that the nurses did not have anything to do with the aides' performance appraisals until February 1989, and even then, the nurses' involvement was episodic and superficial. *Id.* at 45a-46a. Respondent did not solicit

[1] The Act's definition of supervisor includes employees who have authority "to hire, transfer, suspend, lay off, recall, promote, discharge, * * * reward, or discipline other employees." 29 U.S.C. 152(11).



or desire the nurses' recommendations, but in fact told them "*not* to answer the forms' ultimate questions—about 'overall evaluation' and whether or not to 'recommend continued employment.'" *Id.* at 45a. After the nurses completed and signed their parts of the forms, they "turned them in to one of their superiors" and "did not participate in the meeting between each aide and the administrator or [director of nursing] at which the performance appraisal was discussed." Nor was there a showing that a nurse's low performance appraisal "ever leads to the discharge of an aide, or to the threat of discharge." *Ibid.*

Based on those findings, the ALJ concluded that respondent's nurses have no authority to "discipline" employees, to "discharge" them, or "effectively to recommend such action," as those terms are used in Section 2(11) of the Act. Pet. App. 46a.[2] The Board affirmed those findings and conclusions of the ALJ, *id.* at 12a, and the court of appeals did not disturb them.

Against that background, respondent is incorrect in arguing that the "questions presented by the petition are 'purely artificial and hypothetical.'" Br. in Opp. 6. The crux of the court of appeals' decision is its rejection of the Board's established rule that a nurse's assignment and direction of the work of lesser-skilled aides, in the exercise of professional judgment and incidental to the

[2] The ALJ did not "ignore[]" the nurses' job description or the ratio of employees to supervisors in the nursing department if the nurses are not supervisors. Br. in Opp. 5 n.4; see also *id.* at 9 n.9. But the ALJ went beyond the nurses' job description and determined that, in fact, the authority that the nurses had over the aides was not sufficient to meet the Section 2(11) criteria for supervisory status. Pet. App. 37a-46a. And the ALJ noted that specific ratios are not dictated by the Act and they cannot overcome other evidence that is inconsistent with supervisory status. *Id.* at 48a.

nurses' treatment of patients, does not transform the nurses into supervisors under the Act. Pet. App. 8a-10a. The court gave no other basis for overturning the Board's ruling, and there is none in the record. Accordingly, the legal issue raised by our petition is concretely presented for review in this case.[3]

2. On the merits, respondent contends (Br. in Opp. 7-8) that the Board's approach to determining the supervisory status of nurses would exclude any professional from supervisory status and that the Board's test rests on arguments similar to those that were rejected by the Court in *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980). Those contentions do not bear on the appropriateness of this case for certiorari, and, in any event, reflect a misreading of *Yeshiva*.

Contrary to respondent's contention (Br. in Opp. 9), the Board's rule would not exclude "all but a few health care workers from supervisory status." The Board will find nurses to be supervisors where, in addition to performing their professional duties and responsibilities, they also possess the authority to affect the job status or pay of employees working under them. See Pet. 12-15 and n.7.[4]

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[3] Both the Sixth and Seventh Circuits have acknowledged the circuit conflict on that issue. See *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548, 1549 (6th Cir. 1992) (noting there that there is "some tension within the caselaw in this area"); *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). Although respondent claims (Br. in Opp. 9 n.10) that the conflicting cases are "distinguishable on their facts from this case," it makes no effort to draw those distinctions, and, more importantly, admits that there is a conflict over the governing legal principles.

[4] In passing, respondent also suggests (Br. in Opp. 7 n.7) that the Board did not raise in the court of appeals "the interplay between the Act's coverage of professional employees and its exclusion of supervisors." That is incorrect. The Board noted that, in directing others' work, a health care employee acts in accordance with professional training and norms for the provision of care in the best interest of the patients; that the Board has, accordingly, consistently avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients; that Congress approved of the Board's approach in enacting the 1974 health care amendments to the Act; and that the Court likewise approved of that approach in *Yeshiva*. Board C.A. Br. 18-20.



Nor is there merit to respondent's reliance on *Yeshiva*. There, the Court found that certain university professors were managers, and thus not entitled to the Act's protections for employees, despite the Board's contrary conclusion. Respondent notes (Br. in Opp. 8) that the Court rejected the Board's contention in *Yeshiva* that, in formulating and making policy for the university, the faculty members acted primarily in their own professional interest and not in the interest of their employer. Respondent overlooks, however, the Court's acknowledgment that "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974). Accordingly, far from rejecting the rule that the Board has applied here, *Yeshiva* lends support to the validity of that rule. To the extent there is any question about that reading of *Yeshiva*, this Court should resolve the issue and should hold that *Yeshiva* is consistent with the Board's approach to supervisory issues in the health care field.

3. Respondent contends (Br. in Opp. 10) that, since the allocation of the burden of proof was not determinative in this case, it is not an appropriate issue for review here.

Review of the burden of proof issue is nevertheless warranted because it has divided the courts of appeals and because the Sixth Circuit has indicated that its position will govern future cases reviewed in that circuit. See Pet. 19-22.

For the foregoing reasons, and those set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

JERRY M. HUNTER
*General Counsel*
*National Labor Relations Board*

JULY 1993

No. 92-1964

# In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED JUNE 8, 1993**
**CERTIORARI GRANTED OCTOBER 4, 1993**

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 92-1964

NATIONAL LABOR RELATIONS BOARD, PETITIONER

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*FOR THE SIXTH CIRCUIT*

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**INDEX**

The following documents have been omitted in printing this joint appendix pursuant to S. Ct. R. 26.1, because they appear on the cited pages in the appendix to the petition for a writ of certiorari:



## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Board Case No. 9-CA-26348

In the Matter of: HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

| Date | Document |
|---|---|
| 4/10/89 | Charge |
| 5/25/89 | Complaint |
| 6/6/89 | Answer to Complaint |
| 8/16/89 | Hearing |
| 10/22/90 | Administrative Law Judge's Decision |
| 1/21/92 | Decision and Order |
| 3/10/93 | Decision of the Court of Appeals |
| 3/10/93 | Judgment of the Court of Appeals |
| 6/8/93 | Petition for Writ of Certiorari filed |
| 10/4/93 | Petition for Writ of Certiorari granted |

UNITED STATES OF AMERICA
BEFORE
THE NATIONAL LABOR RELATIONS BOARD
REGION 9
VOLUME I

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Case No. 9-CA-26348

In the Matter of:

HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA, INC. D/B/A HEARTLAND OF URBANA, EMPLOYER

*and*

RUBY WELLS, AN INDIVIDUAL, PETITIONER

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Room 205
U.S. Post Office
150 N. Limestone
Springfield, Ohio

Wednesday,
August 16, 1989

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The above-entitled matter came on for hearing, pursuant to Notice, at 10:00 o'clock a.m.

BEFORE: HON. STEPHEN GROSS
Administrative Law Judge

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APPEARANCES:

*On behalf of General Counsel:*
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*On behalf of Respondent:*
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Toledo, Ohio 43603

[8]

**CYNTHIA CORDREY,**

called as a witness herein, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. VAUGHAN:

[73] Q. And then what was said?

A. So then Brenda asked me for my resignation again, and I refused to give them my resignation. And with that, she told me that they would have—we would have to sever our ties with the HCR as of right then.

Q. Did you say anything at that point?

A. Yes, I told her that was fine, but I wanted it in writing, why I had been fired. And she told me that was fine, she'd get it to me.

Q. Did you ever receive anything in writing?

A. No, I did not.

Q. During the shift when you worked as—or during the time you worked at Heartland and you worked as an LPN from 7:00 p to 7:00 a, was there an administrator or a DON that was on duty directly or present in the facility?

A. No, there wasn't.

Q. What was the understanding? Was there someone on call or what?

A. If we had a problem—if we had a problem we called a DON or the ADON. And, when we didn't have the Director of Nursing for two or three months we had to call Linda, because Sandy was our ADON, but didn't—she was not allowed to tell us anything, so we just called Brenda.

[73a] Q. Now, what happened when—you said that there were aides. The aides work three shifts; is that correct?

A. Yes.

Q. So, there were aides on duty from three 'til when?

A. Three 'til eleven.

Q. Three 'til eleven. You worked with aides?

A. Yes.

Q. When you came on at 7:00 p.m., go through a normal evening for us. What did you do in relationship to the aides? What contacts did you have with them?

A. Okay. When I came on, they were already working.

Q. Did they have certain patients that they were attending or—

A. Yeah.

Q. How did they know what to be doing at that time?

A. They more or less picked where they were going to go. It was just a rotation type thing, where if Jean



Stanehope was in the back hall last night, she was in the front hall the next night.

Q. So, what did they do when you got on the shift then?

[73b] A. I would find out who was working where, what aide was working at what division, because they divided it depending on the aides whether it was fron [sic] hall or back hall. They would just report to me then.

Q. What kinds of things are you referring to, by out of order? Give us an example.

A. If someone felt warm when they took their temperature and she had a temp, they would tell me. If someone had a foley catherater [sic], they were use to maybe 700 output and they only had a 100 output.

Q. Were these things to do with patients care?

A. Yes.

Q. Now, what happened when there was a change of aides at 11:00 p.m.?

A. Okay, when the eleven to seven came on, I would go through every patient's name and tell them if there was any change.

Q. And what do you mean by change?

A. Okay, I would go through: Cindy Cordrey, fine; Jim Millspaugh, fine; Ruby Wells, fine; Mr. Dunphy—

Q. You're giving those as examples?

A. Yeah.

Q. Of patients?

A. Right. Mr. Dunphy, no output—oh, I'm sorry. I'm sorry.

[74] JUDGE GROSS: Could have used something else.

MR. DUNPHY: I hope that's not a Freudian slip.

A. But these are the things we did: elevated temp, face flushed, not responding well, lethargic; please watch him, I want his temp tonight.

Q. How did the aides coming on at 11:00 p.m. know which patients they were to tend that night? Did you have anything to do with that?

A. Well, they just took a section. There was front hall and back hall, and they just each—they worked together; that's just it.

Always before, from the time I've been there, the two aides on night worked together.

Q. How many aides were on from 11:00 p. to 7:00 a.?

A. Two on each wing, and we were supposed to have a float.

Q. I see. So the two aides that were assigned to A wing, who made that assignment, though? Who scheduled them to come in, if you know? Who made out the schedule as to who was to work when?

A. Either Linda or Brenda.

Q. Did you ever make out the schedule as to when aides were supposed to come in to work?

[75] A. No. I have copied the schedule before, because they had the same schedule.

Q. But did you play in part in deciding the days that a certain aide would work?

A. No.

Q. Now, after they came in, then, on their assigned day, if you know, how did they know, or how did they decide, the two of them, as to what they were supposed to do, divided on the floor?

A. Well, they just worked together. They went from front hall to back hall, together. They divided up the books, front hall and back hall. If one aide had had front hall the night before and the other aide had had back hall, then they just switched the halls.

Q. I see. How would you describe their work? As routine, or differing, or how would you describe what they had to do every evening?



A. It was a routine procedure.

Q. Did you have anything to do, or any responsibility, if an aide that was supposed to come in at 11:00 p.m. called in, right before the shift, and said they would not be in?

A. If they called in, I had to write an absentee slip up on them, and then I'd just go through whoever's day off it was; I'd call them to see if they could come in to [76] cover.

Q. Now, what did you do with the absent slip that you filled out on that person?

A. Leave it in Linda Cooper's door.

Q. Did you have anything to do with that absence report after you put the slip in Linda's door?

A. No.

Q. Then describe in more detail: How did you know who to try to call, then, to get a replacement? Was it up to you, to get a replacement, then?

A. Yeah.

Q. And how would you do that?

A. We had schedules: day shift, night shift, and the evening shift. Okay. I would go through the night shift first, and anyone that was off that night, I would call them, A or B wing, and see if they could come in. If they couldn't, before I'd start on days, I'd ask my evening shift girls that were already there, if any of them wanted to work overtime. If they said no, then I started calling day shift.

After that, I called—when Linda was there, I'd call Linda. When Linda wasn't there, I called Brenda, to find out what to do.

Q. And how did you know that procedure? How long had you been doing it that way?

A. I'd been doing this for—the time I started [77] work there.

Q. Always in the same order, going through the evening shift first, and then asking anyone on the night shift if–

A. The night shift, then the evenings, then the days. Yes.

Q. Why did you do it that way? What made you start doing it that way?

A. Marianne Curl, my past DON, director of nursing, had informed us that's the way it should be.

Q. So your past DON had told you to do it that way?

A. Yeah.

Q. Had you ever received any contrary instructions from any DON?

A. No.

Q. Any administrator?

A. No.

Q. So you'd always done it the same way?

A. Yes.

Q. Did you ever require someone to come in, if they said they couldn't? Did you tell them that they had to come in?

A. I didn't, no.

Q. Did you ever, or did you have the authority to [78] ever require someone to stay over, to cover a shift?

A. No.

Q. What happened if there was no one available? If you'd got through the entire list and no one could either come in or stay over, then what happened?

A. I had to call Brenda or Linda.

Q. And then what would happen, to cover the shift?

A. They told me, if there was no one to work, that I had to do the best I could.

Q. Was there another source of nurses that you could call on sometimes?



A. The nurse's aides? Yeah, you can call the pool, an agency that has aides.

Q. And what is a pool?

A. It's an agency where you call and you tell them that, you know, you're short-staffed on aides, and that you need an aide for the 11:00 to 7:00 shift, or whatever shift you need.

Q. Did you ever, were you ever in the position of having to call the pool?

A. For an aide?

Q. Yes.

A. I was never granted permission to call an aide.

[79] Q. Were pool aides ever called in?

A. While I was there, no. Maybe once or twice, but not that I have called.

Q. Was there ever a situation where you had to get a nurse–what happened if the nurse replacing you couldn't come in?

A. If the nurse couldn't replace me, if she called in sick, I had to go through the same list: the night nurse–or the day nurse that was off, I was to call her. It was just the opposite, then. I was to call her, and then I was to call the on-call nurses, which we didn't have any. So then I had to start just calling anybody, or asking–like, calling Ruby and asking her if she could work, and maybe they could try to find someone to replace her.

When I couldn't find anyone, I had to call Sandy or Linda or Brenda.

Q. And then what would happen?

A. At the time that I needed–the time that I called a pool was, Linda Cooper wasn't there. Sandy was there, so I called Sandy. And Sandy told me she had no authorization to call the pool. So she called Brenda, and then Brenda called me, and told me to go ahead and try to call

all the nurses; I told her I already had. And she told me that she would take care of it at six o'clock in the morning. And I said, what am I supposed to do at seven, when I'm [80] supposed to get off work; and she said, you can call the pool, but not til after eleven o'clock tonight.

Q. Did you ever call the pool for a nurse or an aide without prior permission from the administrator or the DON?

A. No.

Q. What were your instructions in that regard?

A. We were not allowed to.

Q. And by "we," are you referring to the nurses?

A. All of us.

Q. Okay. Did you have any responsibility about documenting or writing up aides?

A. Yeah.

Q. Would you describe that responsibility?

A. Okay. If an aide did something wrong—say if a patient's rails weren't up and the patient could have falled out of bed—I've got to discipline, or at least talk to them. I wouldn't write them up for that. But if the incident went on and on, or someone complained and it was something more serious, I would write up a counseling form, that I did talk to them. And they had the chance to write down what their reaction was, and then I would turn it in to whomever.

Q. Would you be turning it in to the DON?

A. I would turn it—to her door, there. Yeah.

[81] Q. Now, when you wrote this, was this—did these instances have to do with deficiencies in their patient care?

MR. BIXLER: I object to the leading nature of those questions, your Honor. I think she can—

MS. VAUGHAN: I'll rephrase it, your Honor.

Q. What kinds of things did you document about aides? Can you give us a specific example?



A. Say if an aide reported to me that another aide did something wrong, which—say a aide said, this aide didn't feed, didn't do the bed right, didn't put the side rails up, and wasn't pulling her share of the work or something.

At that time, what I'd do was, I used to go to the DON and talk to her. So what she told me to do—and at the time it was Marianne Curl. Because I don't like taking someone else's word—it was Marianne Curl, so Marianne said, to solve the problem, Cindy, I want you to document—I want you to talk to her; I want you to document that you talked to her, so I know. And then if the problem goes on, then I can talk to her. So I said okay.

Q. And is that the procedure that you followed thereafter?

A. That's the procedure I followed, unless—at one time an aide did—a patient asked for a bedpan, and that [82] aide told her no. And the patient herself told me, and she was alert enough to tell me. So yes, I did write it up, that a patient had asked for the bedpan and she refused. And when I asked the aide, she said yes, that was true.

Q. And then what did you do with that documentation, or that write-up?

A. At that time, I gave it to Brenda Stabile.

Q. Now, once you had turned in what you had written up, in to either the DON or the administrator, did you participate in any way with a follow-up? Or did you know what happened after that?

A. No.

Q. Did you ever tell an aide, or tell an LPN—particularly an aide—that you were issuing them a disciplinary reprimand or a disciplinary warning?

A. No, I just told them I had to document it.

Q. What did you tell the aides, if you were having to document something? What did you tell them it was? Or—if you did.

A. I told them, this is not a write-up. I said, this is jsut to show you that I have talked to you. And with your signature on here, it shows Marianne that we discussed the problem. But I told them, this is not a write-up. Because they were afraid this was a write-up, the next one was whatever, and then they would be fired. I told them no, it [83] was not that.

MS. VAUGHAN: I'd like to have this marked as General Counsel Exhibit 4.

(WHEREUPON, General Counsel Exhibit No. 4 was marked for identification.)

Q. I'd like to hand you what's been marked as General Counsel Exhibit 4. Do you recognize that?

A. Yes.

Q. Okay. Can you tell us what it is?

A. That's where I wrote Jean up.

Q. And is that the form that you used for the write-ups that you normally –

A. Right.

Q. Is that what your normally used for write-ups, when you had to write an aide up?

A. Right. She told us, use the counseling form.

Q. Who told you that?

A. Marianne Curl.

Q. And is that what you always did?

A. Yes.

Q. And that was your practice?

A. Yes.

Q. I see. Now, what did you do with that form, once you filled it out? Or – strike that, just a minute.

What is your handwriting on that form?

[84] A. My handwriting is where it says "problem." Well, at the top, "date" and "employee." Then, where it says "problem," that's mine.



Q. Okay.

A. Then where it says "statement by employee," that is Jean Stanhope.

Q. Did she write that there when you were talking with her?

A. Yes.

Q. Okay.

A. And then "resolution of problem or action taken," that's my handwriting.

Q. All right. And you signed it?

A. "Signature of staff member."

Q. And then what did you with that, after you had spoken to Ms. Stanhope about it and filled that out?

A. At that time, it was Marianne Curl; we slid it under her door, the DON.

Q. The DON, you slid it under her door?

A. Mm-hmm, yes.

Q. Did you know whether – if you know, did that lead to any disciplinary action to Ms. Stanhope?

A. I don't know whatever happens to these. I never – I'm not told.

MS. VAUGHAN: I would move the introduction of [85] General Counsel 4, your Honor.

MR. BIXLER: No objection, your Honor.

MR. DUNPHY: No objection.

JUDGE GROSS: Received.

MS. VAUGHAN: Thank you.

(WHEREUPON, General Counsel Exhibit No. 4 was received in evidence.)

Q. Would you say that this is typical or not typical of the kinds of things that you would write up?

A. Typical.

Q. Do you remember what led to your writing that?

A. Yes. I went to Marianne Curl and she told me that she needed it documented, for further purposes.

Q. Why did you go to Marianne?

A. Because I don't feel comfortable writing up a patient when I don't actually see – I mean writing up a resident, when I don't actually see them doing this. Other aides will report so and so's not doing their share of the work. Well –

Q. Had that not occurred in this case –

A. Yes.

Q. – other aides had reported to you?

A. Yes.

Q. And then what did you do with that report? Did you take it –

[86] A. I went to Marianne, and then that's when she said, regardless, you need to talk to her and see if it's true, not true, and let her know that there is a problem with it. So I said okay.

Q. All right, thank you.

MS. VAUGHAN: I'd like to have this marked as General Counsel Exhibit 5, a two-page document.

(WHEREUPON, General Counsel Exhibit No. 5 was marked for identification.)

MS. VAUGHAN: Thank you.

Q. I'll hand you what's been marked as General Counsel Exhibit 5. Do you recognize that?

A. That's my writing, yeah.

Q. Can you tell us the circumstances around or why you wrote that?

A. I wrote this because that was a patient that was very alert, who did ask for bedpans, and Joanne had not given her the bedpan.

Q. And did you speak to Joanne Jenkins –

A. Yes, I did.

Q. – about it?

What part of that document contains your writing?



A. All of it.

Q. And did you talk to Joanne Jenkins about that [87] matter?

A. I talked to her. She said that was fine if I wrote her up. You know, that she'd never do it again; she didn't need to write anything, that she was guilty of it.

Q. And what did you do with that document?

A. I gave this to Brenda.

Q. And, if you know, did that lead to any further disciplinary action? If you know.

A. I don't know what happened after that.

Q. As far as you know, did Jean Stanhope continue to work –

A. Yeah.

Q. – at the facility after you had given that write-up?

A. Yes.

Q. Did Joanne Jenkins continue to work at the facility after –

A. I don't know when, exactly, but after a while she was no longer employed there. But I don't know if she quit or was fired, because she was also going to school and had talked about quitting. She was going to college.

Q. Even today, you do not know whether she quit or she was fired?

A. I have no idea.

Q. Did you ever make a recommendation, to either [88] the DON or the administrator, or anyone in management, that action be taken against Ms. Jenkins?

A. I told them we had a problem with her.

Q. Did you make any recommendations as to what action should be taken?

A. No.

MS. VAUGHAN: I'd move the admission of General Counsel 5, your Honor.

MR. BIXLER: No objection, your Honor.

JUDGE GROSS: Received.

(WHEREUPON, General Counsel Exhibit No. 5 was received in evidence.)

MS. VAUGHAN: Now then, I'd like this marked, as General Counsel 6.

(WHEREUPON, General Counsel Exhibit No. 6 was marked for identification.)

MS. VAUGHAN: Thank you.

Q. I'd like to hand you what's been marked as General Counsel Exhibit No. 6. Do you recognize that?

A. Yes.

Q. What are those copies of?

A. Those are absence reports. When someone does not call in or show up, or if someone calls in, we are required to make these out.

Q. Is that the absence report to which you were [89] referring earlier in your testimony, that you filled out if someone called in?

A. Yes.

Q. And what did you do with these absence reports after you filled them in?

A. Put them in Linda's door.

Q. And Linda being the DON?

A. Received them. If Linda wasn't there, we put them—well, we still put them there, and Brenda got them.

Q. And did you ever make a recommendation that somebody ought to be disciplined because they were absent, or make a recommendation as to a specific action to be taken?

A. No.

MS. VAUGHAN: And I'd like to have this marked as General Counsel Exhibit—or I'll move the admission of GC 6, your Honor.

MR. BIXLER: No objection, your Honor.



MR. DUNPHY: No objection.

JUDGE GROSS: Received.

(WHEREUPON, General Counsel Exhibit No. 6 was received in evidence.)

MS. VAUGHAN: This marked as 7.

(WHEREUPON, General Counsel Exhibit No. 7 was marked for identification.)

Q. Can you identify what's been marked as [90] General Counsel Exhibit 7?

A. That's my writing.

Q. So did you write that?

A. Yep. Yes.

Q. And what led to your writing that? Or why did you write that?

A. I'm reading it.

Q. That's okay.

(Pause)

A. Okay.

Q. Did you ever turn this in to management?

A. Yes.

Q. To whom did you turn that in?

A. Probably under Brenda's door, or Linda's.

Q. And why did you write that?

A. Because I thought she ought to know that the other aides were getting upset with Gloria because she wasn't coming in to work. They were having to cover her hours, after she had just taken off all the holidays.

Q. Did you make any recommendation, to anybody in management, that Gloria Thompson be discharged?

A. No.

Q. And, in fact, was she discharged? If you know.

A. At the time, I didn't know if she had been [91] discharged or what. No.

Q. Did she work after the January 2nd, '89, date that you wrote this?

A. Yeah. She had worked nights, but when she came back, she worked days; she came in on day shift.

Q. Do you have any responsibility for an aide's timecards if they work over?

A. They're signed, that they were there. We sign our initials so that the DON knows that they were working and not just in the building, not clocking out.

Q. And then what do you do with that timecard?

A. It just goes right back in their slot.

Q. Do you make any recommendation on their timecard, that they were—there was some impropriety or anything like that?

A. No.

JUDGE GROSS: Do you have a timecard?

THE WITNESS: Yes.

Q. Who initials your timecard, if anybody, when you work over?

A. The other nurse that I'm relieving, or that is relieving me, signs that I was actually working while I was there.

Q. And how do you know to do that? How did you know to sign aides' timecards, to verify their having been [92] there?

A. Ledra Schmidt, when she was the ADON, she used to do timecards, and she was running into problems with there being a lot of overtime—or people not clocking out, forgetting to clock out. So she told the nurses from now on, if the work wasn't done and they had to work over 15 minutes, would we please initial it, so she'd know that they were actually working, rather than just having a pizza down in the cafeteria and not clocking out until later, to get overtime.

Q. Did you ever make any recommendation as to whether or not they be paid for that time?

A. No.



Q. You just simply initialed the hours that they were there, or that they were over.

A. Right.

Q. In what instances would an aide stay over? How would that come about, why would that be?

A. A lot of wet patients, incontinent patients, on last bed check. A death at 10:30 at night. An emergency, to where we had to ship a patient to a hospital.

Q. And how would the aide know that she or he was required to stay, or should stay?

A. They just knew that they were not allowed to leave the floor until their work was done. And that was not my rules; that was Marianne's rules.

[93] Q. The former DON?

A. Yes.

Q. Was that ever modified or changed in any way by the present administrator—

A. Not that I know of.

Q. —or Brenda? Okay.

Did you have anything to do with aides' evaluations?

A. When I first started working there, yes, I did. And then in January, I filled out one, and then the day before I was fired, I helped fill out a couple with Connie Thatcher, the LPN that shares the 3:00 to 11:00 shift with me.

Q. Okay. Now, you say you filled out some when you were first hired. When was that? During what time period did you fill some evaluations out?

A. Okay, let me see. I started in '84, so it would probably been—maybe the end of '84, and then '85.

Q. Did you do any during '86 and '87, or '88, that you recall?

A. Not that I recall. I might have, '86, but I can't—it was a short period of time that we did it, and then we didn't do it any longer.

Q. Do you know why you quit doing them?

A. Yeah. Marianne finally got a – Marianne [94] Curl, the ex-DON, finally got an ADON that, once she learned everybody, then she went ahead and did the evaluations.

Q. So they were done by the ADON for a period of time?

A. Yes.

Q. Then, after that period of time, when was the first time you had anything to do with an evaluation again?

A. January – the end of January.

Q. Of '89?

A. Yes.

Q. Do you recall how that came about or what you did? First of all, what did you do?

A. Okay. When I came in to work, they told me that I had an envelope in the narcotics lock-up, which is under the sink. So I got it out, and it was from Sandy Townsend, it was on Joyce Daniels; and on the note, it said: Cindy, can you please help me out – can you please help me with the evaluation – whatever. But she had a list of things I could not mark.

Q. And what were those, if you recall?

A. Absenteeism, tardiness, personal appearance, and overall evaluation.

MS. VAUGHAN: Let me have this marked as – what are we up to, 7? General Counsel Exhibit 7?

JUDGE GROSS: Eight.

[95] (WHEREUPON, General Counsel Exhibit No. 8 was marked for identification.)

Q. All right, I'd like to hand you what's been marked as General Counsel Exhibit No. 8. Do you recognize that document?

A. Yes.

Q. Is that the evaluation to which you were just referring?



A. Yes.

Q. All right, now then. If you'll look at that, tell us what you filled out.

A. Okay. I filled out number 2, I filled out –

Q. You made that check?

A. Yes.

Q. In the number 2 box?

A. Yes.

Q. All right.

A. I filled out number 3, I filled out number 5, down there in "comments," that's my comment. I filled out number 6, and I filled out number 7. And that was the last, except for my signature.

Q. Did you make any recommendation at all as to the overall evaluation?

A. No, we were not allowed to touch that.

Q. Did you discuss or did you participate in the [96] discussion of this evaluation with the employee involved?

A. No, we're not allowed to do that.

Q. What did you do with this evaluation, or performance appraisal, after you finished the checks?

A. We had to stick it back in the envelope and – Sandy had left a note saying we could leave it locked up under the sink or slide it under her door; and I slid it under her door.

Q. Did you fill in the name at the top, and the dates and so forth? Is that your handwriting?

A. No, it's not.

Q. Was that given to you with that on it?

A. Yes.

Q. And did you have anything to do with it after you filled out the portions that you described to us?

A. No.

Q. Did you make any recommendation at all, as to what should or should not happen to Ms. Daniels, on the basis of that appraisal?

A. No.

MS. VAUGHAN: I move the admission of 8, General Counsel 8.

MR. BIXLER: No objection.

MR. DUNPHY: No objection.

JUDGE GROSS: Received.

[97] MS. VAUGHAN: Thank you.

(WHEREUPON, General Counsel Exhibit No. 8 was received in evidence.)

Q. And then you started to testify that, a few days before you were terminated, you did some evaluations.

A. Yes.

Q. Can you tell us how that came about, or who instructed you to do that?

A. When I came to work, Connie Thatcher said that Sandy had brought—Sandy Townsend, the ADON, had brought down some evaluations that she needed done; that she needed both of our input, because Connie and I had both worked with the girls from 3:00 to 11:00. Well, she worked from 3:00 to 7:00 with them, and I worked 7:00 to 11:00 with them.

Q. Okay.

A. So we went through the evaluations; once again, it had been told to Connie, you know, what we were not allowed to fill out. So that's what we did. Connie and I filled them out together. She signed, like, half, and I signed the other half.

Q. And was Melinda Stillgas one of the aides that you filled out at that time?

A. Yes.

MS. VAUGHAN: I'd like to have that marked as General Counsel Exhibit 9.

[98] (WHEREUPON, General Counsel Exhibit No. 9 was marked for identification.)

Q. I hand you what's been marked as General Counsel Exhibit 9. Is that one of the evaluations, or performance



appraisals, that you filled out shortly before you were discharged?

A. Yes, it is.

Q. And what portions of that performance appraisal did you fill out? First of all, is this your handwriting at the top, with the person's name and so forth?

A. No, it isn't?

Q. Okay. Did you fill out any of the top part before the bold black line?

A. No, I didn't.

Q. What did you fill out or what did you check below that line?

A. Well, I checked 2—doesn't look like my check mark—2, 3, 5, 6, 7.

Q. Did you have anything to do or discussion with any management official about the check for overall evaluation?

A. No.

Q. Did you have any recommendation or have any conversation with management about the "recommend continued employment"?

[99] A. No.

Q. What did you do with that evaluation, after you completed your part?

A. Connie and I both put them in the envelope and stuck them under—under the sink; I think we were told to leave them under the sink, at that time, locked up, and Sandy would pick them up in the morning. That's where our narcotics were kept.

Q. After making the check marks that you did, did you—were you consulted in any way, or make any recommendation as to whether Ms. Stillgas should get a raise or a demotion, or a promotion, or anything like that?

A. No.

Q. Did you see or hear anything about that appraisal after you filled out the checks and sealed it and put it back under the sink?

A. No.

MS. VAUGHAN: I'll move the admission of 9, your Honor.

MR. BIXLER: No objection, your Honor.

MR. DUNPHY: No objection.

JUDGE GROSS: Received.

(WHEREUPON, General Counsel Exhibit No. 9 was received in evidence.)

Q. Did you play any part in hiring people?

[100] A. No.

Q. In firing people?

A. No.

Q. Did you ever recommend that anyone be fired?

A. No.

Q. Did you ever recommend that action, or disciplinary action, be taken against an employee?

A. No. Other than to, you know, write what was going on. But nothing more than that.

Q. Did you yourself ever issue a suspension? Did you ever suspend anyone?

A. No.

Q. Did you ever issue a formal disciplinary written reprimand to anyone?

A. No.

Q. Do you recall an incident where an aide became abusive on the floor, with a baseball bat?

A. Yes.

Q. About what time was that, or how long ago?

A. Before—

Q. Approximately.

A. It was before Christmas; October, November.



Q. And you don't have to name the aide, but essentially tell us what happened.

A. I asked him what was wrong, because you could

[115] A. Six per side.

Q. And you're referring to the two wings?

A. Yes.

Q. And how many aides did you understand were to be in attendance from the 3:00 to 11:00 p.m. shift?

A. Four per side.

Q. And how many aides did you understand to be required to be in attendance between 11:00 p.m. and 7:00 a.m.?

A. Two per side, with a float.

Q. Could you explain what you mean by a float?

A. A float is an aide that has specific duties given to her by the DON, and she works half the night on one side and half the night on the other side. So she works A wing part of the night and B wing part of the night.

Q. Now, is there a listing pertaining to nurse aides' responsibilities, which is set out in any part of the facility, about routine responsibilities of the nurse's aides?

A. Yes.

Q. And where is that located?

A. In the dirty utility room.

Q. And what, essentially, is contained on that listing?

A. It's like on Monday, clear through the week, they have specific job duties that they are required to do along with taking care of the patients; such as, say, Monday [116] night, clean bedpans and urinals; Tuesday night, wash wheelchairs; Wednesday night, clean the linen cabinet.

Q. And for each day of the week, there was a listing of responsibilities that the nurse aide on duty at any particular time was required to perform on that particular day?

A. Right.

Q. Was there a listing of job responsibilities for nurses at any location in the facility?

A. Yes.

Q. And where was that?

A. At the nurse's station.

Q. And could you describe the nature of that document?

A. Like on Sunday night, the nurse was to clean the refrigerator; defrost and wash it out, and clean out the meds. Tuesday night, say, wash down the medicine cabinet. The next night, maybe go through all of the meds, to make sure that the medicines that were out of date were pitched.

Q. And just to clarify your testimony: So that there were specific listings for specific days of the week, that a nurse was required to perform certain responsibilities on those particular days?

A. Yes.

Q. Who do you understand that established those [117] documents, both for the nurse's aide and the nurses? Who do you understand established those work responsibility documents?

A. The DON.

Q. Were you involved, at all, in that, or any of the nurses, to the best of your knowledge, in preparing those listings?

A. No.

MR. DUNPHY: Your Honor, at this time I would like to have marked as an exhibit an additional employee handbook. I would be happy to provide the original at this time; however, I would like to substitute it at a future date with a copy, because it is my only original copy. And unfortunately, I intended to present only certain parts of



this, therefore I don't have any copies other than one other copy, to provide at this time. Although I believe both counsel, I'm sure, are aware of this particular manual.

JUDGE GROSS: Let's go off the record.

(WHEREUPON, there was an off-the-record discussion.)

JUDGE GROSS: Mr. Dunphy.

MR. DUNPHY: Thank you, your Honor.

Q. Mrs. Cordrey, I'm going to show you a document which I would ask be marked for identification purposes as Charging Party's Exhibit No. 1, with permission of

[152]

**STEPHENIE JACKSON**

called as a witness herein, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. VAUGHAN:

[156] independent, and such as this. And it just goes right on down the line til you cover all of your residents.

Q. Okay. And besides just holding them out in your hand, like you described, and the aides selecting the sheet they want, how else have you handled which aides get which patients to care for?

A. As I said, I have assigned them myself before. I've taken the sections before me and told a particular aide this is where you—you know, you'll be working today.

Q. And how do you make that decision?

A. Just more or less by looking at where they had been the day before, and then I just try to change that up, so that no one is working in a particular section for a long period of time.

Q. Is there any difference—or are all the aides able to do all the work of the aides?

A. They're supposed to.

Q. And how would you describe their work, day in and day out? How would you describe that as, or what kind of competence or expertise would that require?

A. I'm not sure.

Q. You don't understand the question?

A. No.

Q. What kinds of things do the aides do?

A. Routine care: bathing—well, cleansing,

[162] Q. Have you ever had an occasion to document or write up an infraction, or some lack in an aide?

A. I can't say that I have actually—

I have sat in to be the second witness, or while one has been, you know, written up.

Q. Oh, I see. And who would ask you to be a witness to the write-up?

A. Well, it was basically both of the nurse—you know, the nurses on at the time. And this was just a recent, you know, issue, where we had an aide who had—

Well, there's questionable abuse, let's put it like this, and we had to talk to her. But it was me and the other nurse; we did the counseling. And that was basically how it went.

I should say it's a counseling session. We don't do the so-called reprimanding.

Q. And when you say we, are you referring to the nurses?

A. The other nurse, yes, that was—

Q. Who does the reprimanding?

A. That usually is left in the hands of the director of nursing.

Q. After you do a counseling, do you make any recommendation of further action for them?

A. No.



[163] Q. What do you do with your—do you document your counseling?

A. It's documented.

Q. And what do you do, what—

A. And then it goes to the director of nurses; and then, from that point on, it's up to her to—or it has been habit that, from that point on, I guess, we really just don't know what happens. It's in her hands.

Q. And what kinds of things—I mean, do you initiate a counseling session, or are you told to perform one?

A. I can initiate it. A lot of times, I have spoken with the director of nurses first, regarding an issue, and have then been recommended to write them up or a verbal counseling.

Q. Okay. What kinds of things warrant a counseling with an aide? Can you give us some examples?

A. Well, I would basically say, neglect of duties. Of course, naturally, if there's any question of abuse or mishandling by the aide.

Q. Mishandling the patients, you mean?

A. Patients, yes.

Q. I see. Have you ever counseled an employee with regard to something that didn't directly relate to patient care?

A. No, not that I can recall.

[164] Q. For instance, if there's a problem with absenteeism or something like that, would you do the counseling of that?

A. No.

Q. Who would do that?

A. That would go back to the director.

Q. Now, when you were working on the 7:00 a. to 7:00 p. shift, I take it, I understand that there was a change of aides at the shift at 3:00.

A. Yes.

Q. Now, how long were the DON and the ADON in the facility, on average?

A. An hour, maybe.

Q. You mean, after that shift changed?

A. An hour after that.

Q. So what was the procedure if an aide called in and wasn't going to be arriving at 3:00, or wasn't going to—was calling off for the shift? What happened then?

A. Well, it fell upon—if I was the nurse that took the call, it was up to me to find a replacement at that point.

Q. And how do you do that?

A. You get on the phone, and you just start calling everybody who's off schedule and see if they would come in to work.

[176]

**CROSS-EXAMINATION**

BY MR. BIXLER:

[178] Q. What made you unhappy about it?

A. Because it had been more or less our, as the nurse on the floor, our opportunity to be able to divide the sections, according to how we felt the sections should be divided to benefit, you know, our residents.

Q. In other words, this says, if there are six aides on a wing and there are 45 residents, each aide will have nine residents. And that's probably incorrect math.

But was this your understanding of what Linda Cooper was saying, would be that you would take the number of residents and divide by the number of aides, and that's how many patients each aide would be assigned?

A. That was my understanding.

Q. Okay. And prior to this coming out, you were not doing it that way; is that correct?



A. A lot of times, maybe, our assignments would not be made up that way; because there were people who required more care. So in other words, not to load them down, then we'd—our assignments were made up somewhat differently.

Q. I think there's a phrase I'm not completely familiar with, but I think it's acuity level.

A. Yes.

Q. Do all the residents have an acuity level?

A. Yes, they do.

Q. Would you explain the acuity level?

[179] A. It's hard for me to put it in terms.

Q. Okay. Could I suggest that it really has to do with how much care that particular—

A. The level of care—

Q. Yeah.

A. —usually, yes.

Q. Okay. So before this came out, is it true that what you would try to do is, to assign sections to each aide, and the sections would—you would try to make the sections equal, in terms of the acuity level of all the patients; is that correct?

A. This was an attempt, yes—

Q. Okay.

A. —made.

Q. And so you'd try to make a judgment as to what would be a fair workload for the aides.

A. For each aide.

Q. For each aide. Okay.

Now—

JUDGE GROSS: Let me ask about that.

What are some of the things that go into acuity level? Continent or incontinent, would that be one?

THE WITNESS: Well, yes.

JUDGE GROSS: What are some of the others?

Q. Ambulatory and nonambulatory?

[180] A. Yes.

Q. What do we mean by those terms?

A. Well, ambulatory, they can walk; nonambulatory, they cannot walk.

Incontinent, well, they cannot hold their bowel or bladder; and continent, they can.

Q. And I suppose weight might have something to do with it, if a patient is 250 pounds, versus somebody who's 125 pounds?

A. That could probably play a part of it, yes.

Q. And then, with respect to those individuals, somebody who's 250 might have control of themselves completely and be able to help you lift, while somebody who's smaller might be just dead weight.

A. Well, that's true, too.

Q. Those are some of the types of things that go into acuity level?

A. I would say so, yes.

JUDGE GROSS: What about the nature of the medical problem?

THE WITNESS: I don't know that that affects it or not. I would hate to—I would not want to say for sure, because I do not know. I don't know for sure.

JUDGE GROSS: That wouldn't be part of your formula?

[181] THE WITNESS: No. No.

Q. Well, would it make a difference, if somebody was a tube feed and not a tube feed?

A. Not so much for an aide's assignment, no.

Q. And I suppose there would be people there who could feed themselves, and people who could not feed themselves.

A. True.



Q. Okay. Anything else that comes to mind, in determining acuity level?

A. No.

Q. Okay. So, before this note came out from Linda Cooper, you were trying—you were making judgments as to an individual's acuity level, and trying to equal out the workload of the aides; is that correct?

A. We did make attempts to try to make the workload—

Q. And that was an important part of your daily work assignment, wasn't it?

A. That was a part—I would not say it a daily. Because once we had made our sections, they became standard.

Q. That's right. Because there may not be any change in the acuity level for quite some time; is that correct?

A. Well, that's quite true.

[182] Q. But then there could be new residents, new admittees, and/or there could be a change in the acuity level of a particular resident, so that that might cause your sections to get a little bit out of whack.

A. It could vary. It could end up making someone else's load a little heavier. But once our sections were made, that was pretty much standard.

If we had someone who died, they were no longer in that particular room; whomever was admitted to that room, that's where they ended up on that particular section. Because sections are very hard, to have to make up on a daily basis, so pretty much, once they were made up, they were standard.

Q. Would that be something that you might work on other than between 7:00 and 3:00, working up your sections?

A. You could do it. It would probably be more appropriate to do it that way.

Q. Did you ever do that, Mrs. Jackson?

A. Ever take my sections home, to work on them? Yes, I did.

Q. Okay. Now, when Mrs. Cooper sent out this note, which has been marked as General Counsel 11, do you know whether she was still expecting you to make adjustments based upon acuity levels in the aide assignments?

A. No, I don't know.

[183] Q. You don't know whether she was or not.

A. No, I don't.

Q. If everybody showed up and there were no absences, no call-ins, would the ordinary staffing level be six aides on your shift and wing?

A. Yes.

Q. Okay. And I take it that if only five showed up, then you would have to make adjustments in the assignments, to get as much of the work done as you could—

A. Yes.

Q. —is that correct?

And the same thing if there's only four?

A. Yes.

Q. And you said you even went down to three aides at some time.

A. Yes. But for my shift; this is really, basically, I'm saying, to cover all shifts, too. We have assignments, you know, made up according to how many aides we have—

Q. Okay.

A. —on per shift.

Q. Right.

A. But for days, it has gotten down to four.

Q. Never gone down to three, that you can recall?

A. I'm going to be honest and say I cannot truly [184] recall.



Q. Okay, thank you.

Could you, for the benefit of us who do not work in a nursing home and have not for quite some time, could you tell us what the daily regimen might be, in terms of the workload of the nurse aides?

A. For the nurse aides?

Q. Yes, on the 7:00 to 3:00 shift. I realize that there's different things going on in different shifts. But on your shift, and not in detail, but—I know you have to get up, get breakfast, baths, those types of things. What would you do?

A. As far as their duties go.

Basically, they have their routine down pat, as far as they know they have to pass ice, and they have to pass trays and pick up trays. Of course, as I say, bathing and grooming the residents; getting them to their meals, if they should go to diningroom; potty. They are various, various responsibilities for the aides through a shift.

Q. Would bathing and showering be one of the more major tasks—

A. Yes, it is.

Q. —that they would do? Pardon me?

A. Yes, it is.

Q. Okay, thank you.

[185] And not every patient would be bathed every day; is that right?

A. Every resident is bathed every day, except that they are not complete bathes every day.

Q. I see. Some—

A. Some receive partials.

Q. Some of them would go to the shower or to the bathtub, and others might be cleaned in their room or in their bed.

A. In the room.

Q. Okay. And I suppose you would try to work it out so that aides would not all have to – that one aide wouldn't have to give all the baths one day, and, you know, that that particular assignment might be adjusted and worked out fairly for everybody.

A. Honestly, to try to vary assignments so that the same aide did not have to end up in the same section every day for a week or two weeks.

A. And, doing those types, that type of work on your part, would you agree that that's really – it's important in terms of the morale of the aides, I suppose, isn't it?

A. Yes, it is.

Q. And it's important to the overall quality of the care that the residents get, isn't it?

[186] A. Yes.

Q. Okay. Just a few more, Ms. Jackson.

Would you be responsible for assigning the lunch breaks? Well, let me strike that.

How many breaks and lunch periods would they get in a day?

A. An aide gets two breaks a day, and her lunch period.

Q. Okay. And how long are the breaks?

A. Breaks are 15 minutes, and lunch is 30.

Q. Okay. And would you be responsible for sending the aides on break and on lunch?

A. I never assigned breaks. I let them decide amongst themselves, at which point in time they would report to me, who was going on first break or who was going to second break. But I usually let them have the freedom to decide this amongst themselves.

Q. As long as there is still proper coverage –

A. As long as the –

Q. – on the floor.



A. Right.

JUDGE GROSS: Could you have done it a different way?

THE WITNESS: I could have told them when they could go. I could have said, you know, so and so, you go to [187] break at 9:15, and then – I could have chose to do that.

Q. Now, I think you mentioned that the aides call you by your first name.

A. Yes, they do.

Q. And you call them by their first name.

A. Yes.

Q. Okay. And you would call Linda Cooper by her first name, wouldn't you?

A. I call her Linda, yes.

Q. And Brenda Stabile, you would call Brenda?

A. Brenda.

Q. Okay. Now –

JUDGE GROSS: How about the aides? Do they call Brenda Brenda?

THE WITNESS: Yes.

Q. In some ways, it's a pretty congenial place, I guess. At least you're on a first-name basis.

A. Yes, we're on a first-name basis.

Q. Okay. Fair enough.

Now, let me ask you –

(Pause)

MR. BIXLER: Let me have this marked as Respondent 2.

(WHEREUPON, Respondent's Exhibit No. 2 was marked for identification.)

[190] A. Yes.–

Q. Okay. And were you aware that you could get one of these forms from the administrator or the DON, if you wanted to write up an employee?

A. I could not say that I was truly aware that I had the choice in—

Q. Okay.

A. —using one of these forms.

Q. All right. So you would just use the counseling—

A. Counseling form.

Q. Okay. And did you say you just filled out a counseling form on one occasion?

A. I've never filled out a counseling form, myself. As I said, I chose to speak with an aide before, verbally.

Q. Okay.

A. But I've never, really, truly put anything into writing.

Q. Okay. You understood, though, that you could have filled out the counseling form?

A. Yes.

Q. Okay. What was that particular incident that you're referring to, now?

A. I just—that I can recall most recently, [191] just an incident where one of the residents was complaining about an aide and her lack of giving him care, because she felt he could do it himself. A lot of his care he could do himself. And I then had to take her to the side to speak with her and to talk to her about this.

Q. Okay. So the aide wasn't giving care to a particular resident because the aide thought that the resident could do some things—

A. Could do more for himself.

Q. I see. Okay.

And you did take the aide aside and counsel with the aide.

A. Yes, I did talk to her.

Q. All right. And would it be correct that you were satisfied with that conversation and the aide, to the point where you decided not to do the counseling form?



A. I didn't take any action against her. I did tell her that, if it would occur again, I felt at that time we would have to go far beyond what we had done, and, I think, then, take it up with the director of nursing and, probably, then, make it a true warning.

Q. Okay. Now, you said that was recently?

A. Yes.

Q. Would it be fair to say that that has happened on occasions, at the times, rather than this just [192] one recent occasion?

A. Yes.

Q. Okay. All right. Now—

(Pause)

MR. BIXLER: Let me have this marked as Respondent 3, I believe.

(WHEREUPON, Respondent Exhibit No. 3 was marked for identification.)

Q. Mrs. Jackson, could you take a look at the Respondent's Exhibit 3, which is the performance appraisal, and let me ask if you recognize that form.

A. Yes, I do.

Q. Now, have you had performance appraisals on this form, of your own performance over the years?

A. Yes.

Q. Okay. Have you also filled this form out for some of the aides that worked for you, or portions of the form?

A. Yes, I have.

Q. Okay. Would you tell me how that procedure works, in filling that form out?

A. Well, you check-mark whether it's excellent, above standard, standard, or below standard. Usually, when I have done it in regards to an aide, I will cover human relations and attitudes towards work, personal appearance, job [193] capability, development, and patient care.

Q. Okay. The punctuality would be a subject that, I guess, we have actual records on; is that correct?

A. Correct.

Q. All right. So you wouldn't fill that out.

A. No.

Q. Would you do the overall evaluation of the aide?

A. When I look at this, I believe I have check-marked the excellent, above standard, standard, below standard. Beyond that point, it was no longer mine.

Q. Okay. So over in the righthand column, there is a section there that says "overall evaluation."

A. Yes.

Q. And you believe that you have checked off one of those designations for the aides that you'd do this on?

A. I believe I have.

Q. Okay. But then you wouldn't have gone any further, with "recommend continued employment," the next section; you haven't filled that out?

A. No.

Q. All right. Is there anyone that you recall recommending, to the DON or the administrator, that their employment not be continued?

A. No.

[194] Q. There's been no probationary employees that you have told the DON or the administrator, or somebody else, that they shouldn't be continued employment?

A. I don't know that I've ever actually said that I don't believe that they should, you know, have continued—no longer work for us. But I do believe that at some points I have risen questions as to the capabilities of an aide, as to whether she could handle the job.

Q. And do you recall that, when you raised that question or issue, that that was taken into consideration, as far as you knew?



MS. VAUGHAN: Objection. I think she's testified that she didn't recommend to either continue the employment or otherwise, and I think it's beyond her scope of knowledge, when she said it wasn't hers any longer, I think was her testimony.

JUDGE GROSS: Well, why don't you rephrase the question.

MR. BIXLER: Well, the question was, whether she knew whether the issue that had raised had been taken into consideration, as to the decision.

JUDGE GROSS: All right. You can—

MS. VAUGHAN: I think she's—

JUDGE GROSS: You can answer the question, Ms. Jackson.

[195] A. Not that I know of.

Q. Okay. Do you know whether—and maybe this is just the same question, slightly rephrased, and allow me:

Do you know whether anyone was terminated, based upon issues that you had raised with management about their performance? And I'm referring to a probationary employee, now.

A. I can only answer that no, not that I can recall.

Q. Okay, very good. Thank you.

Now, if we would just take a look at the section under—well, let me ask you this question. I'm sorry.

When you filled this form out, would it be fair to say that you do try to do a good job of filling this form out?

A. Yes.

Q. And you consider that your filling this form out, evaluating the employee, is an important task that you have to perform.

A. I feel that it would be an important task, yes.

Q. Okay. And when you do it, you take it seriously; is that correct?

A. Yes.

[196] Q. And let's just take "human relations."

Now, when you fill this out, now, under "human relations," there are subcategories of "cooperates with supervisors, is courteous and friendly, controls his emotions for the best interest of all, and works well with other employees." Then there's a section for "needs improvement in" and some blank spaces.

Now, when you're filling this out on an employee, and using number 2, I take it, you would review these items mentioned under "human relations," would you not?

A. I would attempt to.

Q. And then try to reflect back on the employee's performance, over the years—

A. Yes, I would.

Q. —as it relates to this.

A. Yes, I would.

Q. And then, based on that, you would try to make a judgment as to whether you thought the person was excellent, above standard, standard, or below standard; is that correct?

A. Correct.

Q. Okay. And you would essentially follow the same procedure with each one of the items that you're responsible for?

A. Correct.

[197] Q. Okay. And then, I suppose, in doing the overall evaluation, you would try to make a judgment of where, based upon all the scores that the person had, where their total performance evaluation ought to fit; is that correct?

A. That would be correct.

Q. Now, would it be fair to say, Ms. Jackson, that the performance appraisal, again, would be something that, done properly, would be helpful to the morale of the employee?



A. Yes.

Q. By giving him honest feedback about where he or she is good or bad.

A. Yes.

Q. Okay. And doing these in the proper way, would you agree, could also help with the delivery of quality nursing care at the facility?

A. I believe it could.

Q. Okay. Now, you mentioned that you did not attend the inservice. It's been discussed quite a bit here, and I believe it was a "mandatory" inservice—

A. Yes.

Q. —in February?

You did not attend that?

A. No.

Q. Okay. Did you have notice of it?

A. That I can't recall.

[205] MR. BIXLER: I have no further questions, your Honor.

**REDIRECT EXAMINATION**

BY MS. VAUGHAN:

Q. Mr. Bixler gave you a hypothetical example of, if you were short, and would you or could you ask someone to stay over until at least you could get hold of the DON. Had that happened?

A. Not that I can truly recall.

Q. When you have asked aides to stay and help out, can you require them to? Or is that a voluntary—

A. Make them stay?

Q. Yes.

A. No.

Q. Do they know that?

MR. BIXLER: I'll object, your Honor.

JUDGE GROSS: Overruled.

A. I don't know if they know that.
Q. Is it more or less a voluntary basis?
A. It truly is.
Q. Okay. Is that also true, when you have to try to go through the list to call someone in to cover someone's absence? Is that a voluntary basis?
A. Yes, it is.
Q. Do you have any authority to require them to [206] come in?
A. I cannot make them come in, no.
Q. After you initial their timecard, what does that mean? Why do you initial it?
A. Simply to show payroll that they have worked those extra hours.
Q. Do you make any independent judgment, as to whether they get paid or not, or is that up to payroll?
A. Well, no, I make no independent judgment there.
Q. Do you perform an appraisal on every aide that works on your shift?
A. No, I don't.
Q. How do you know when to do one and when not to do one?
A. When the director asked me if I would do a particular aide, then I do it.
Q. And how often does that come about, or what percentage of the aides would you say that you had something to with it?
A. I could probably count in on both hands, how many I've ever filied out.
Q. So would you say it's – well, in the other cases, who does the aides?
A. And I'm talking over the five-year period,



[220]

**PROCEEDINGS**

**CYNTHIA CORDREY,**

called as a witness herein, having been previously sworn, was examined and testified as follows:

**CONTINUED CROSS-EXAMINATION**

BY MR. BIXLER:
[241] Q. Now, Mrs. Cordrey, I'd like to show you what's previously been marked as Respondent's Exhibit 2, which is this employee warning notice; it's the blank one. I'm sorry.
A. That's okay.
Q. Do you recognize that form?
A. Yes.
Q. Have you, in the past, filled that form out on any employees?
A. Never.
Q. Okay. Let me show you –
MR. BIXLER: If we can show the witness – I don't know what's going to be easiest – General Counsel 4 and 5?
JUDGE GROSS: Let's go off the record.
(WHEREUPON, there was an off-the-record discussion.)
Q. Now, Ms. Cordrey, do you have General Counsel Exhibits 4 and 5 in front of you?
A. Yes. I do.
Q. And those are the forms entitled "Employee Counseling" forms –
A. Yes.
Q. – which you filled out on – No. 4 is on Jean Stanhope, and No. 5 is on Joanne Jenkins.

A. Yes, sir.

[242] Q. Correct? Okay.

Now, you understood one of your duties to be to fill out these forms on employees when the occasion arose; correct?

A. Yes.

Q. Okay. And I take it that you took this part of your duties seriously?

A. Yes.

Q. And I take it that you felt that it was an important responsibility of yours, to do this, when it became necessary?

A. Yes. I was told to fill them out.

Q. Okay. My question was, did you consider it to be an important part of your responsibility?

A. Yes.

Q. Okay. And would it be fair to say that, in filling out these forms, you tried as hard as you could to do a good job; on using the forms, on expressing what should be expressed in the forms?

A. Yes, hopefully.

Q. And you understood that the proper utilization of these forms was important to the employees themselves, didn't you?

A. Yes.

Q. Okay. It would be important to them, to [243] understand what was expected of them; if they did something wrong, you could fill this form out so that they would clearly know what was expected of them. Is that correct?

A. Yes.

Q. And would you agree that it was important to their morale on the job, that these forms be filled out fairly and correctly?

A. Yes.



Q. Okay. And would you also agree that it was important to the residents, that these forms be used properly, so that if there was an aide doing something wrong, that you could correct that improper behavior on the part of the aide?

A. Yes.

Q. Okay. Now, I take it that – I believe we have – well, let me ask you: Were there incidents that would have happened on the floor, that were not exactly correct, but rather than writing somebody up, you would just verbally talk to the aide, take the aide aside and counsel the aide?

A. Yes.

Q. Okay. Not every little thing that went wrong out there would end up in you doing a write-up, would it?

MR. DUNPHY: Your Honor, I'm going to object to the use of the term write-up, because I think that implies a certain formal disciplinary procedure.

JUDGE GROSS: I think that's fair, be careful [244] about that.

MR. BIXLER: Well, I believe that term has been used by everybody, and I don't believe I was the one who introduced it; but I'll use the correct term of the form.

Q. Would it be fair to say that you would not use this counseling form for every little incident that occurred out on the floor?

A. It sort of needs an explanation.

I wrote these up when I was told to write them up.

Q. Okay.

JUDGE GROSS: What do you mean by that?

THE WITNESS: I'd go to the DON with the problem that existed, and she'd let me know whether to counsel it and document it or not, or just to have a talk with them.

Q. Now, did you take every little problem that occurred on the floor to the DON, and ask her whether you should do that or not?

A. No.

Q. Some of them you would just handle yourself, wouldn't you?

A. Yes.

Q. Without going to the DON.

A. Right.

Q. Okay. And so it would be correct that there [245] would be some things that would happen out there, which were not exactly correct, but you didn't consider serious enough to even go to the DON; is that correct?

A. Correct.

Q. And you'd handle those with the employee directly, yourself.

A. Yes, I would.

Q. Okay. Now—

(Pause)

MR. BIXLER: Your Honor, could I just have a second here?

JUDGE GROSS: Off the record.

(WHEREUPON, there was an off-the-record discussion.)

MR. BIXLER: I'd like to have this document marked as Respondent's Exhibit 4, please.

(WHEREUPON, Respondent Exhibit No. 4 was marked for identification.)

MR. BIXLER: Could we show the witness Respondent's Exhibit 4, then?

Q. Ms. Cordrey, do you recognize Respondent's Exhibit 4?

A. Yes, I do.

Q. Could you tell us what that is, please?

A. It's an evaluation on Carnelina Bean, a [246] nurse's aide.

Q. Is that your signature, in the space provided for the evaluator's signature?



A. Yes, it is.

Q. Now, I believe, based on your previous testimony, in filling out these performance appraisals you only concerned yourself with item 2, which is human relations; item 3, attitudes toward work; item 5, job capability; item 6, development; and item 7, patient care. Is that correct?

A. Yes.

Q. Now, again, filling out that portion of the performance appraisal form is one of the duties and responsibilities that you had in your position as a nurse at Heartland of Urbana; is that correct?

A. Once in a while, yes.

Q. Okay.

A. When I was asked.

Q. All right. And again, when you were asked to do this, I take it that you took that request seriously.

A. Yes.

Q. And you made a sincere effort to do a good job on filling out the performance appraisal, didn't you?

A. I'd hope so, yes.

Q. Okay. And you think you did do a good job, correct?

[247] A. I hope so.

Q. And again, would you agree that that, doing a good job on the performance appraisals, by you, was an important part of your duties, wasn't it?

A. Yes.

Q. And that's important to the employee who's being evaluated; obviously, that can affect his morale and performance, so would you agree that that's important to the employee himself?

A. Yes.

Q. Okay. And it's important to the residents, also, that, to the extent that this can help improve somebody's performance, that will help the residents; is that correct?

A. Yes.

Q. Okay. And so this would be an important function to the good operation of the facility overall; would you agree with that?

A. Yes.

Q. Okay. Now, when we go down to human relations, would it be fair to say that, before you filled this form out, that you would at least review what the items were, under human relations?

A. Yes.

Q. Okay. And then would you try to reflect on those items, as far as the individual's performance were [248] concerned, prior to filling out the particular block?

A. Would I think about it, before I filled out a block? I would like to hope so.

JUDGE GROSS: Let's go off the record.

(WHEREUPON, there was a off-the-record discussion.)

Q. That wasn't a very good question; I apologize for it. What I'm just asking is whether you would take some time to reflect on the individual's performance as far as each one of these items under human relations were concerned.

A. Yes.

Q. Okay. And would it be fair that you would say, under attitudes toward work, that you would do the same thing; that you would review what particular items on the form were to be evaluated under attitudes toward work, and you would reflect on the individual's performance throughout the period covered, and then try to use your best judgment on where they ought to be rated?

A. Yes.

Q. Okay. And you would do the same for each one of these categories that you had responsibility for; is that correct?



A. Yes.

MR. BIXLER: I would move the admission of Respondent's Exhibit 4, your Honor.

[424] (WHEREUPON, the witness was excused.)

JUDGE GROSS: Let's go off the record.

(WHEREUPON, there was an off-the-record discussion.)

Whereupon,

**JEAN STANHOPE,**

called as a witness herein, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. VAUGHAN:

Q. Ms. Stanhope, would you state your full name and address for the record, please?

A. Jean Stanhope, 320 Hill Street, Urbana, Ohio.

Q. And where are you employed?

A. Heartland of Urbana.

Q. How long have you been employed there?

A. Been there six years.

Q. And you're still employed there?

A. Still employed there.

Q. In what position? What's your job?

A. Nurse's aide, second shift.

Q. Are you here pursuant to a subpoena that you received from me?

A. Mm-hmm.

Q. What wing do you work on?

[425] A. I've always worked on A wing.

Q. Which shift do you work on?

A. Second shift, 3:00 to 11:00.

Q. Have you always worked second shift?

A. Always worked second shift.

Q. Directing your attention to, well, now—for instance, now—who is your supervisor? Immediate supervisor.

A. Immediate supervisor's name is Rosemary, the lady that's—well, our supervisor, as far as that, is the DON.

Q. And directing your attention to January and February and early March of 1989, who was your supervisor at that time?

A. It was Terry, then they changed it to some other assistant DONs they had in.

Q. Do you know the names?

A. Oh, I can't remember all—we had some changes, I can't remember the names. But Terry was one, Sandy Townsend was one.

Q. Did you ever have an occasion to work with Cindy Cordrey?

A. I worked with Cindy for five years.

Q. Was she ever your supervisor?

A. To me, she was just a nurse on the floor.

[426] Q. Did you ever have an occasion to work with Ruby Wells, Julia Goldsberry, or Connie Thatcher?

A. When they went to a 12-hour shift, I did.

Q. And how would that come about, when would you work with them, with those women?

A. It was just certain days that they were scheduled to work. Like Connie Thatcher and Julie was like from 7:00 p. to 7:00—from 7:00 a. from 7:00 p. And then Ruby would be in from 7:00 p. to 7:00 in the morning, which I worked with her from 7:00 to 11:00.

Q. I see.

When you come in on a typical day, what do you do when you first come in?

A. At 3:00 we come in, we stand at the nurse's station and listen to the day report. It depends on which nurse is



on duty. Like if Julie was working from 7:00 to 3:00, she would give the 3:00 nurse's report. At 3:30, we'd leave the nurse's station and go and do our work.

Cindy was the regular—well, in the five years, she was working 3:00 to 11:00. Around 3:30, she should be getting through with the other information that the nurse would have to give her. She sets up her meds. By 4:00, she's passing her meds, at 4:00. From 4:00 to 5:00, she's on the floor, passing our pills. We're doing our bed checks, getting everybody dressed and ready for supper.

[427] Cindy can choose to go to supper at 6:00 to 6:30 or from 6:30 to 7:30. Between that time, she's still passing her meds. And then she goes to her supper—

Q. You're referring to Cindy Cordrey?

A. Cindy Cordrey, uh-huh.

Q. All right, go ahead. What else do you do on a typical day?

A. Typical day, we get everyone dressed and ready, changed, and make sure they're ready for supper, and we get them up in the chair for supper, return them, and change them in bed. We do that from 3:30 to about 5:00. And then at 6:00 we have it—there's four girls on the floor, and two of us go down to supper from 6:00 to 6:30. The other two girls stay on the floor and do the rest of picking up the supper trays, answering for the lights.

And then when my supper hour is over at 6:30, I go back on the floor, and I will finish up my section. And the nurse, whatever shift she takes to go to her supper, she starts setting up her cart for her meds.

Q. How do you know when to go to supper?

A. We go at 6:00.

Q. Who goes at 6:00?

A. The two aides will go at 6:00. We have four aides, two in front hall, two in back. One from each hall will go down at 6:00, come back at 6:30, and the other two will go

[428] down from 6:30 to 7:00.

Q. And how do you know whether you're supposed to go down at 6:00 or 6:30?

A. It's always been that way.

Q. How do you know what to do when you come in?

A. What to do? The nurse – well, the aides had trained you to do the work, and we knew exactly what we do to each one of the patients. And we get the routine together; we change everyone, we get them dressed or, you know, change them, make sure they're dry and clean, their face and things are ready for supper, hair combed –

Q. Who is "we"?

A. The four aides. The other three aides I work with.

Q. All right. Okay. go ahead,

A. And that's our regular routine. We do that, and then we have ones that are feeds, assist feeds. We make sure the ones that go down to the diningroom for supper is down there on time. We have the ones that we have to ambulate, get them ready; you know, walk them for a few minutes and then get them in their chair for supper, make sure the restraints are on them. Make sure we got bibs passed out, make sure the water is close to the patient, so they can get to it.

Q. Did you have anyone who, while you were doing your respective chores, was watching and making sure that you [429] did them correctly?

A. No, huh-uh.

Q. How did you know what to do, how to do it?

A. Like I said, they were trained first. Whoever's – and like I say, I was trained by Freda; when I started in '83, a lady named Freda trained me for my shift. And that's the way we learn how to take care of the patients.



Q. And during 1989, back in January and February, the winter of 1988-89, how were people trained, aides, if there were any new aides?

A. Any new aides, it would depend on the nurse on duty. She would ask one of the aides that had been there long enough to go ahead and orientate the new aides.

Q. And what did you do? Did you ever participate in the orientation of a new aide?

A. Yes, uh-huh.

Q. What did you do with that aide, when you –

A. Okay, that aide, I would take her from room to room, explain to her about the patients; tell the patients' names, the needs and the wants that we do for them.

Q. How often would you estimate that you see the nurses on duty during your shift? Can you give us some idea about what frequency, or where, and when, and how often you see them?

A. As often as we're in the hallways. We go in, [430] it takes us maybe 10 to 15 minutes to do a patient. In between that time, we can still go out in the hallway and see Cindy's cart out there. And she's in and out of the room, and we're in and out of the room, so we see her constantly, going back and forth to the room. Either we're ahead of her or behind her.

Q. What happens if you want to change your day that's scheduled? Have you ever done that?

A. Yes, I have.

Q. And what do you do, when that occurs? How do you change your day?

A. Okay. We have swap sheets at the nurse's station. We go up to the nurse's station. If Missy and I want to exchange days, say Missy works –

Q. Who is Missy?

A. Missy Stillgas, one of the girls I work with.

Q. Is she an aide?
A. Uh-huh, she's an aide.
Q. Go ahead.
A. And if an emergency comes up and she knows that I'm working on a—you know, I'm off on a Friday, we would swap. I would take and work Tuesday, and then she'll work for me on that Friday. We just switch our days around.

The swap sheets are at the nurse's station. We fill them out. Ruby or Cindy looks at them, they put the [431] names on the paper. Then any paperwork that they have will go to the front office. And it's on the DON's office, and she will see it the next day.

Q. Have you ever had one of those not be approved?
A. No, they've always been approved.
Q. Who schedules your work, if you know?
A. The DON schedules our—fix up our schedules for the month.
Q. Are you ever asked about your preference for days or something like that, anything like that, when you want to work, before the schedule comes out?
A. No. Our regular—you know, our regular schedule is the way it goes. And if you want to work an extra shift, you usually ask. If there's going to be short, you usually ask and you fill in for that day.
Q. What happens if you have to be off sick?
A. Well, you're supposed to call in and let them know that you're sick, and then they should be able to find a replacement.
Q. And you work from 3:00 to 11:00?
A. Mm-hmm.
Q. Who do you call, when you call in sick?
A. Well, I used to call in just for—on A wing, and let the nurse know on A wing, that I was gong to be sick.



[432] And this way they'd know that you're going to be sick, and they send a message down to the DON's office. And she should be able to find a replacement.

Q. Have you ever been asked to stay over your shift, instead of going home at 11:00? Have you ever been asked to stay over?
A. Yes, I have.
Q. How does that come about, or what happens, and what circumstances?
A. Okay. If someone called in for 11:00 to 7:00, and they called in sick and said they can't come in, then we'll give the message to Cindy and Ruby, and they will try to find a replacement. If they haven't found a replacement, then Cindy and Ruby will come back and ask us, would one of us mind staying over and pulling a double. And we can. And if they find a replacement, we don't. If they're between finding a replacement, we'll agree to stay until they find a replacement. If not, then we stay and pull a double shift.
Q. How is it decided who stays over?
A. We're asked. You know, we're not told; we're just being asked, could we stay over.
Q. And if there's only one needed, how do you know which one stays?
A. The nurse will ask all four of us. When we're all together, she will ask us if one would like to pull a [433] double. And then we have a choice to say yes or no.
Q. Have you ever accepted, in that situation?
A. Mm-hmm.
Q. Have you ever turned it down?
A. Yes, I've turned it down. Plenty of times.
Q. Have you ever been required to stay over and work extra?
A. Yes. If one of the aides was going to be an hour late, they will ask us, you know, request if one of us will

stay over until the aide shows up. Then Ruby or Cindy had to initial my timecard.

Q. But my question is, have you ever been told that you have to, or be subject to a reprimand?

A. Hmm-mm.

JUDGE GROSS: The answer is no?

THE WITNESS: No.

Q. Have you ever received a written reprimand or any disciplinary action?

A. Just a conference I had with Cindy.

Q. Well, describe that. What happened?

A. I had two aides that I worked with, went into the DON's office and told them I wasn't doing my work, I was bossy, I wasn't dong this and that. And it was Marianne Curl that was our DON. She contacted Cindy, and then Cindy got hold of me, took me away from my work, told the other [434] girls that she had something she had to do. We went and talked about it, and that was it. It wasn't nothing to be written up. It's just that she had a conference with me.

MS. VAUGHAN: Would you hand the witness General Counsel Exhibit No. 4?

Q. Have you ever seen that document before? What is that?

A. This is what Cindy had talked to me about.

Q. And where were you when she talked to you about that?

A. We left the floor and went to the Minnie Pearl room on dining, off the diningroom, at the Heartland.

MS. VAUGHAN: May I have the witness shown Respondent's Exhibit 2?

Q. Have you ever been issued one of those, or have you ever received one of those?

A. Huh-uh.



Q. I'd like to direct you attention again to this document, General Counsel Exhibit No. 4. What was your understanding that that was, that document?

A. It was just to let me know that there was a problem on the floor and the girls said that I wasn't doing my work.

Q. To your knowledge, did anything else happen because of that?

[805]

**LINDA COOPER,**

called as a witness herein, having been first duly sworn, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MR. BIXLER:

[809] that type of care?

A. Correct.

Q. You said that you were the Director of Nursing, was that the entire time that you were at Heartland of Urbana?

A. Correct.

Q. You were hired for that position?

A. Yes.

Q. Would you tell us what your duties were as the Director of Nursing at Urbana?

A. First and foremost, I was Director of the nursing staff. That is, I was the department head for nursing. This meant that I over saw all nursing personnel, licensed and non-licensed. That is RN's, LPN's, nurses aids, affiliated nurses such as documentation nurses, treatment nurses, be they full time, part time or relief. In service-education was part of my responsibility, to teach, to train, to hire, to counsel.

Q. So, you had overall responsibility for the nursing department?

A. Right.

Q. And to whom did you report?

A. To the administrator.

Q. Now you mentioned several different categories of nurses. What is a treatment nurse?

[810] A. A treatment nurse is a nurse employed primarily, that is what the job description states, for the care giving to residents who have treatments of one form or another. A treatment being outside of their basic nursing care that is necessary for that shift such as dressings to an ulcer, dressings to a wound, tube placements for feedings.

Q. So the treatment nurse would focus or concentrate her attention on those particular treatments?

A. Correct.

Q. You also mentioned a documentation nurse. What would a documentation nurse do?

A. Her title was patient assessment nurse. This stems from the fact that in Ohio we have, can be a minimum of three monthly reviews on patient assessment, that is documentations of which reimbursement is stemmed from. The documentation nurse is not involved with direct patient care other than for file and chart access and documentation usage.

She will deal with documentation, ordering, initiation, completion of admissions, in some cases charting, patient care plan reviews, updating. Does not have involvement with unit rounds, direct patient care, medication tasks, anything of that nature. Monday through Friday 8:00 to 4:30.

Q. While we're at it, what hours does the treatment nurse work?



[811] A. Usually 7:00 to 3:00.

Q. What days did she work?

A. A five day work week. However, there is a treatment nurse on 7:00 to 3:00 shift seven days a week. So the treatment nurse would alternate week-ends.

Q. Is the treatment nurse a LPN or a RN?

A. At the time I was employed there, she was primarily an LPN with an RN coming in on relief. However, it may be either.

Q. A patient assessment nurse would be?

A. An RN.

Q. An RN, okay. There would only be one treatment nurse or patient assessment nurse on shift at any one time?

A. Right.

Q. I believe you also mentioned that there were staff nurses or nursing supervisors and nurse aides?

A. Yes.

Q. We'll come back to the staff nurses. Could you tell us what the nurse aides' responsibility was?

A. The nurses aides are non-licensed professionals. They work directly with the basic nursing care of the patient, i.e., bathing, lifting, helping to mobilize, showering, feeding. They report directly to the supervisor. They take their instructions from that [812] supervisor.

Q. Who is their supervisor?

A. The supervisor of the wing that day.

Q. Is that the staff nurse?

A. Yes.

Q. What kind of training or educational background does a nurse aide need?

A. It varies with the new law that has just come into effect, they will need 80 hours for training in order to take a State certified nurse aide examination. However, until that point, a lot of the training is done their past ex-

perience, maybe upon hire if I was to hire them in that given light. People may have not been an aide before therefore, they will require orientation of the work floor in the facility with the Director of Nursing and the Assistant Director of Nursing and the Supervisor?

Q. When does the new law take effect, if you know?

A. It takes effect July 1.

Q. Of 1989?

A. Yes.

Q. So prior to that, there were no formal State requirements –

A. In Ohio.

Q. In Ohio for, nurse aides?

[813] A. Unless they wished – Some facilities wished to give their Nurse Aids a certificate at the end of what breaks down to a 40 week training period at their facility. That does not necessarily mean – it did not mean that they were State certified and it did not necessarily mean that that qualification transferred to any other facility.

Q. Prior to July 1 of this year as far as you knew, the State of Ohio had no formal certification necessary from nurse aides?

A. Correct.

Q. Now before we talk about the staff nurses, could you give us an idea of the numbers of staff between nurse aides and the staff nurses on a daily basis around the clock?

A. On a day shift which is 7:00 to 3:00, that's 7:00 a. to 3:00 p.m, there will be approximately 10 to 12 nurse aides. This is at full census which is 95 to 100 residents. Sometimes more, but for now only 10 to 12 nurse aides with one supervisor on each wing, a patient assessment nurse and a treatment nurse and a director of nursing.

On 3:00 to 11:00 shift, there is a supervisor on each wing and approximately six nurse aides working 3:00 to 11:00 a



full shift and two nurse aides working 3:00 to 9:00, a six hour shift. Sometimes that varies and it could be seven nurse aides on 3:00 to 11:00, and myself for various [814] hours depending on how many hours I would work that day.

On the night shift, there is a supervisor on each wing and approximately four to five nurse aides, primarily five are scheduled.

Q. Now the night shift was from to what time?

A. 11:00 p. to 7:00 a.

Q. Now at what time – was Heartland of Urbana on 12 hour shifts for the staff nurses?

A. Correct, until May 1 on A wing and June 1 on B wing.

Q. And then what did you do?

A. Then, the supervisors all went to eight hour shifts so that they have one full eight hour shift with their nurse aides instead of a four hour overlap.

Q. Did that change the staffing of the aides at all when you went from 12 hour shifts to eight hour shifts?

A. No, because nurse aides have always be on eight hour shifts since I started at Urbana.

Q. And then how, if at all, the move to eight hour shifts affected the nurses?

A. It basically meant that they were appearing at work more days out of a work week but only working eight hours instead of 12.

Q. Would you have any more on a particular shift than you had previously?

[815] A. No, there would be still one supervisor on each wing.

Q. But now, instead of four in a 24 hour period working, you would have six?

A. Correct.

Q. Would you take the staff nurses—the nursing supervisors I should be referring to them as, and go through their daily routine for us, of what the requirements of that job are?

A. Supervisors were responsible for the unit, that is the residents and their aides for that shift. Usually they would come to work and themselves and the nurse aides, take report and listen to report, listen to what had happened the prior shift with the supervisor who was going off shift. Anything pertinent at that point would be handled by the oncoming supervisor and then transferred appropriately to her nurse aides who were on that day.

The supervisor would then allocate residents to each aide, her resident's status and acuity level. So it was a fair assignment that a patient passes. If the supervisor was an RN, it would involve intravenous medication also.

Direct supervision of the nurses aides on a daily basis for that basic patient care. Counseling when necessary, evaluating be it 30 day, 90 day or a year for the [816] nurse aides on the unit that they work with and supervise; calling families be it to inform then that a patient was due to be discharged, that there was something that happened to the resident that the family needs to be notified about.

Q. Like what?

A. A change in the patient condition, usually had someone call, a phone call incident. Also, that the patient may be refusing treatment and keep calling for that certain family member; change of condition that would be coming quick.

Q. That would be the responsibility of the nursing supervisor to call?

A. Correct.

Q. Before they called the family, would they have to check with the director of nursing?

A. No.



Q. No?

A. No. Calling doctors, changes in a patient's condition, refusal to take medications, lots of different reasons why a doctor would be called to check on his patient.

Q. Again, would they have to check with the director of nursing before they called the doctor?

A. No.

Q. Would you go into the job assignment responsibility of the nursing supervisor in a little more [817] detail, and perhaps give us an example of how that might be handled, say the 7:00 p. to 7:00 a. shift?

A. For example, there would be one supervisor on each wing and five nurse aides—

Q. Now, excuse me, who would schedule the employees to work that particular day?

A. The director of nursing.

Q. Okay, go ahead.

A. On a given day, a supervisor came to work on the night shift, she would find out how many nurse aides were due to be scheduled that day, that night to work, And then find out if they had all shown up. If they had not shown up, find out why.

Taking it first that everybody had shown up, the supervisor would then find out from the off-going supervisor the status of her residents, how many nurse aides she had on her wing that shift, and allocate to each aide a certain amount of residents. This would be to make sure that the nurse aide knew which resident she would carry for specifically regarding charting purposes. Although all the aides and the supervisors are all there for the residents, but this is primarily for charting purposes and accountability.

The nurse aides have a flow sheet and a turn sheet and a restraint sheet to chart on every shift and it's [818] their responsibility to keep that document up to date and correct.

Q. What's a flow sheet?

A. The nurses aide will specify on that if they bathed the residents, fed them, gave them drinks, fluids, how many percentage of their meal they ate, were they restrained, were they turned two hourly, did they have their hair washed, basic nursing needs that would have been carried out by the resident that shift?

Q. What's the turn schedule, I believe?

A. A turn schedule is when someone is turned two hourly or more often. It has to be signed by the nurse aide.

Q. What was the other record or chart that they kept?

A. Restraints. Some residents need to be restrained for their safety and these need to be checked every 30 minutes, released every two hours, and the area massaged and that also needs to be documented.

Q. How often is it to be documented?

A. It's documented once a shift. However, it should be documented every time that it is released, every two hours.

Q. Go ahead, you were talking about the assignment of the nurse aides to specific patients for charting purposes.

[819] A. For example, if there were 50 patients in one wing and 40 were acute and 40 were long term and—residents could be in there a while—and 10 were acute, then I would hope that the supervisor would see fit to make sure that the sign up was fair. In other words, one nurse aide who was brand new, did not get all the acute residents. I would expect to see that it was done fairly so the task and the work load was evenly divided for the resident's benefit.

Q. You use the term "acute." What do you mean by that?

A. If there is someone who may be just lying in bed waiting for a wound to heal to go home but perfectly audible and can talk and feed themselves and is continent, than someone who's comatose and may have an IV in them, an IV in place.



Q. Now are there guidelines to the nurse supervisors on job assignments? How are they supposed to go through that by—that's two questions. Are the guidelines that you put out for the nurse supervisors on how to assign work to the aides?

A. Yes.

Q. Could you tell us what those guidelines were?

A. Basically, they are take the amount of aides you have and divide that into the number of residents you have. So they have an equal number of residents a piece. [820] However, that is flexible according to status and the well being of the residents. For example, one aide would not have ten really poor patients while the others would have five who were up and about and walking.

Q. Is it the nurse supervisor's responsibility to adjust that on a daily basis?

MS. VAUGHAN: Objection. Leading.

JUDGE GROSS: Well, overruled.

MR. BIXLER: Go ahead.

THE WITNESS: Yes.

MR. BIXLER: Okay.

THE WITNESS: Even on a shift to shift basis, within the shift. With patient condition changes.

Q. Now can the number of acute patients—well, let me ask it—How often does the number of acute patients change?

A. Probably not drastically, however, every resident usually per shift—not every resident—a certain amount of residents per shift will change conditions, be it will fall, a wound tear, debilitating problems such as pneumonia. So, a resident may start off a certain shift as a regular

long-term resident could be in there for five years and half-way through the shift become critical.

Q. Can the acuity level of a resident change on a daily basis?

[821] A. Yes.

Q. Could you give us an example of how that might happen?

A. Yes. One patient—there are several reasons for that happening,—is always up in a wheelchair, feeding himself, dressing himself most of the time, Over a period of 24 hours, if this started in the morning, it was noted that he had a little bit of difficulty breathing. However, this was not abnormal, the patient was prone to anxiety phases. By 3:00 to 11:00 shift, and I was still in the building, the patient was having some more problems breathing but not enough to promote to stress. But by that evening, late evening, the patient was admited with acute pneumonia to the emergency room and was actually admitted to the hospital.

Q. Using—

JUDGE GROSS: Let's back up a second. So the patient's having trouble breathing and it gets worse and it gets worse, and let's say this is all happening at about midnight.

THE WITNESS: Uh-huh.

JUDGE GROSS: Okay, and then at midnight?

THE WITNESS: Uh-huh.

MR. BIXLER: What happens?

THE WITNESS: The supervisor would assess, do [822] heart sounds, lung sounds, stethoscope, administer oxygen, call the doctor, call the family, wait for the doctor's orders, transcribe the doctor's orders, carry them out, give emergency medication and transfer if necessary to the emergency room.



Q. At what point in that process would you become involved if at all as the director of nursing?

A. Not necessarily at all until the next day when I came on, I found I was one resident short on my census. I might have a slip which tells me what happened during the night and then I would go to the floor and check up and then usually call the hospital myself and check on the residents also.

Q. But the nursing supervisor would go ahead and handle that situation without seeking your approval at any point?

A. Yes.

Q. Now you were testifying about a situation when everybody shows up on a shift, as I recall. Does it very often happen that there are absences?

A. Yes.

Q. What would happen in that situation? How would the nursing supervisor deal with that?

A. The supervisors on both wings would get together. They would say okay, how many do you have, how [823] many do I have? Lump them (both the aides) together, for want of a better term. And say, okay well we have seven instead of ten. Then it would be up to the supervisor whose people who got called in prior to the shift to start calling first of all, the aides who were off that day usually to see if they could come in. Then aides who were coming on the next shift to see if they could come in earlier. Aides who were on the night shift to see if they could come in at all. From then on, they would call pool nursing.

Q. Are there instructions to the nursing supervisors on this—following this rotation in trying to replace somebody who calls off?

A. When I started at Urbana, it was a given. This is what I understood. That they knew to call. I set the standard on how many there should be regarding State

minimum, State regulations. I was pretty much aware that everybody knew that. Regarding calling pool, yes.

Q. Yes, what?

A. I'm sorry. Yes, they did know that they could use the pool.

Q. But what I'm getting at is you went through the process or procedure about calling to see if somebody could stay over, calling people who are off, calling people that are coming in the next day and so on and so forth. Is there a set procedure, one after another that they're [824] supposed to go through in trying to replace somebody?

A. I'm not sure if—I know I held a meeting regarding that effect. I am not sure when I held it.

Q. Okay. Well, I'm just asking, were those guidelines there at the facility?

A. Yes, I believe so.

Q. Do the nursing supervisors—

MS. VAUGHAN: Your Honor, excuse me. I'm going to impose an objection I think on that. I know the witness has been consistently referring to the LPN's and RN's as supervisors and I let it go because apparently that's what she's comfortable with. I would object to counsel using such a conclusionary term. I think that's what we're here for—one of the issues were here for and that's up to Your Honor.

JUDGE GROSS: The term "supervisors" as used in an organization doesn't have to square at all with the term "supervisor" as defined in National Relations Act. I'm going to overrule your objection because it sounds to me as though Ms. Cooper is familiar with or is used to using the term "supervisor." I don't see any problem with Mr. Bixler using them in those circumstances. It, as far as I'm concerned has no meaning in relation to the issues in this proceeding.



MS. VAUGHAN: Thank you, Your Honor.

MR. BIXLER: Thank you.

[825] Q. Would the nurses be responsible during the shift for break times or lunch periods of the nurse aides?

A. Yes. A lot of the nurses aides quite often, used to like to buddy and go to breaks with each other. But it was up to them to tell their supervisor and say, "we're all going is this okay?" Or it was up to the supervisor to see a certain amount of people remained on the floor to cover the floor safely, to allocate people to the dining room to monitor the dining room, to allocate people to the feed. And so it was up to them to make sure that all the breaks were taken at an appropriate time.

Q. How many breaks would a nurse aide get during the day?

A. They usually get a 15 minute break in the morning. For example, the 7:00 to 3:00 shift, a 15 minute break in the morning, a 15 minute break in the afternoon for coffee and a 30 minute break for lunch.

JUDGE GROSS: Can we go back a second?

MR. BIXLER: Sure.

JUDGE GROSS: You said something about allocating nurses aides for feeding?

THE WITNESS: Feeding residents.

MR. BIXLER: I was just going to go into that, Your Honor.

JUDGE GROSS: All right.

[826] MR. BIXLER: And you also mentioned dining room monitors, I believe?

THE WITNESS: Yes.

Q. Would you tell us what the nurse's responsibility is in terms of assigning the dining room feeders and monitors.

A. Heartland of Urbana has a very large dining room. There are two seatings—there are two seatings starting at

11:00 and 11:30. The people who use the dining room are semi-ambulatory but the main criteria is that primarily they can feed themselves.

So the dining room monitor is a person assigned by the supervisor on that shift to go and make sure that in essence everybody has a second cup of coffee, nobody chokes, everybody is safe eating, there isn't any fighting, that everybody is settled and eating in a proper manner. And to chart percentages of meals taken for those who are being monitored in the chart at that point in time for fluids, etcetera.

Q. Now what does a dining room feeder do?

A. On the opposite side of the dining room there is an area where residents need to be 100% fed are taken in the room in wheelchairs or their geriatric chairs. There are certain aides assigned to go to this area at a given point in time and feed the residents. The rest of the aides are [827] allocated by the supervisors to stay and cover the floor while the other aides are feeding.

Q. Who is responsible—are there some patients or residents who cannot leave their room for the lunch meal?

A. Yes.

Q. And who's responsible for seeing that they are fed?

A. The nurses aides remaining on the floor.

Q. How would their trays get back to the floor?

A. What happens there is, a number of trays come up in a consecutive fashion and so the feeders are usually done towards the end of a shift. That is the meals do not get cold and they are in one lump area. And one aide can feed various residents. The people who are on the floor, the aides on the floor, quite often are supervising nurses who need assistance with feeding, whether they are actually their allocated resident for that day or not.



Q. Does the—do nurse supervisors have authority to assign aides from one wing to another or is that something you do when you figure out the schedule?

A. Initially, I put a nurse's name on a schedule. There are also long term aides who have worked there for many years who prefer to work on one wing and apparently have done so for many years. I didn't want to interfere with that. However, if on a given day, there were too many on that [828] particular wing and not enough on the other wing for whatever reason, then the supervisors on the wing with an excess would ask and their aide would go over to the other wing to help out. If nobody volunteered, then the supervisor would in essence request that they go.

Q. Now with respect to changing shifts from the day shift to the afternoon shift to the evening shift, do the nurse supervisors have any authority in that area?

A. I'm sorry.

Q. As far as changing from one shift to another, nurse aides, what is the authority of the other nurse supervisors with respect to that?

A. The supervisor may ask an aide from one shift to come in and work another shift to fill a gap left by an ill aide, for example; to call someone in off on their day off, ask them to come in early for a shift, that is they would work four hours extra. They would come in maybe four hours early to help cover a gap in time.

They also, some aides, when they come on shift, especially the week-end, may realize they have something planned for the next day that came up unexpectedly. I am not in the building at that point and what happens then is they fill a request slip out which is a change in days. So the aide wants to work this day will swap with this aide. They would both put the day they were going to work and then [829] they would both sign it. And the supervisors would

then approve that and there was a place for her to sign that, him or her to sign that.

And then they come into my office and then I glance at them and then I collate them with the schedule primarily just to make sure that these people know are over here or whatever. And make sure that the schedules is always up to date with people's name on them.

Q. Now earlier you mentioned pool nurses. What are pool nurses?

A. Pool nurse may be aides, LPN's, or RN's or treatment nurses. They are employed by an agency outside of Heartland of Urbana. That is, they are not employed of Heartland of Urbana. There are many nursing agencies.

A pool nurse is someone who would be requested as a last resort for a gap that was inadvertently made in the schedule to cover a shift at the facility at this point in time. They would be recruited by calling a certain agency that the facility was familiar with and was comfortable with. And then they would be told that this person would be coming to work that shift, that day.

Q. Now, who has authority at the facility to call a pool nurse?

A. The supervisors, the administrator, the director of nursing.

[835] They have a—every new aide has a check-off list of tasks and skills that needs to be signed and dated and completed by their supervisor. That is then an account of their past, not only training from the nursing management department, but also from their floor and their supervisor. It then goes in their file as part of their record.

Q. I don't believe I asked you about overtime—Do the nursing supervisors have any responsibility or authority with respect to overtime?

A. Yes. If they, as I said before, ask someone to come in to work four hours of the shift they weren't due for; for



example, if someone was working 11:00 to 7:00 and they asked them to come in at 7:00 to help cover a four hour gap, then they automatically are proving overtime because they know anything past the regular eight hour day, or in the essence of that nurse aide, be it a 75 hour pay period, would be automatic overtime.

Also, if a patient's condition warrants it or a stop-in warrants it, then they will say would you please like to stay four hours over or two hours over to help with feeding. They approve overtime at that point and they sign the aide's time card.

Q. Do the nursing supervisors have any responsibility as far as supplies for the floor are concerned?

[839] Respondent's Exhibits 2 and 3?

BY MR. BIXLER:

Q. Mrs. Cooper, did the nursing supervisors have any responsibility in the area of discipline of nurse aides?

A. Yes they did.

Q. Okay, what is their responsibility?

A. If they find something out of order, it is their responsibility to find out where the problem occurred, who is responsible and counsel them and if necessary, warn them verbally or in writing and discipline them accordingly.

Q. Are there forms at Urbana for issuing the warning notes?

A. Yes there are.

Q. Can you identify Respondent's Exhibit 2 for us? What is that?

A. This is the form that is used to warn a nurse aide.

Q. Now where are those forms kept at the facility—where were they kept while you were there?

A. On both wings and in my office.

Q. What do you mean on both wings?

A. On both units, A wing and B wing. There is a little folder – file type folder – up about three feet high which sits under the nurses desk at the nurses station which has various forms and aides flow sheets, nurses notes and to [840] re-stock the chart. And these were in there and I kept another supply in my office which was where the stock came from initially.

Q. Now, for what types of things would a nurse aide receive a warning notice from a supervisor for?

A. Tardiness, misconduct, physical abuse to a resident, mental abuse to a resident, lack of respect and privacy, disregard for patient safety, disregard for – for assignment from a supervisor in the sense of insurbordination.

Q. You mentioned misconduct, what did you mean by misconduct?

A. Foul language in front of a resident for a given point, un-cooperation with a supervisor to the detriment of a resident, excluding personal.

MR. BIXLER: Can we have General Counsel Exhibit 5?

(Discussion)

Q. Can you identify the General Counsel's Exhibit 5 that was just given to you, Mrs. Cooper?

A. Yes I can.

Q. Okay. Now what is that?

A. This is a counseling form. This is when a supervisor would see that an aide was having a problem be it work related directly to a resident, communication problems with herself, himself or other employees, a detriment of a [841] resident; to sit down with the person concerned and talk to them trying to solve the problem. A lot of these also have a positive effect, they're not necessarily negative.

Q. What is your understanding of the difference in the usage of the two forms you have in front of you?



A. This one is used quite often initially. It's a verbal warning, it's not necessarily warranted. Maybe someone you know is having personal problems that is affecting their work standards. I would not go straight to personally an employee warning of this. I would like to sit down with them and counsel them.

If someone does do something of a grave nature that I feel needs not counseling but definitely needs nipping in the bud, then I would start with the C question, here, usually.

JUDGE GROSS: I would like to get the record to reflect that Mrs. Cooper was first referring to General Counsel 5 and the last reference was General Counsel 2 – excuse me, Respondent's 5 to Respondent's 2.

MR. BIXLER: Thank you. So Respondent's 2 and General Counsel 5, Your Honor.

JUDGE GROSS: Right. You are right. The numbers are right, the designation is wrong.

MR. BIXLER: We could show the witness Respondent's Exhibit 3.

[842] Q. Can you identify Respondent's Exhibit 3, Mrs. Cooper?

A. Yes I can. This is a performance appraisal, also known as an evaluation form.

Q. Okay. Now who has responsibility for filling out that form?

A. The supervisor for nurse aides, myself for supervisors and one similar, the administrator for myself.

Q. Now could you – excuse me – do you have Respondent's Exhibit 3 there?

A. Yes.

Q. Could you tell us the process or the procedure that the nursing supervisor is supposed to go through with the nurse aide in filling out that form?

A. Depending on whether this is a 30 day, 90 day or whatever evaluation, the office prints a list at a certain point in time to tell the director of nursing when a person is due for an evaluation. This list comes to me. I then either—I do it of two ways—if I have any of these in my office, I write the name at the top and their position and put a little sticker note at the top and leave it for the supervisor on their shift who they work with, saying these people are due for the evaluations, please would you see that it be done.

Or these are also on the floor. So if I know [843] they're on the floor, then I will just leave a note for the supervisor and she will fill the name in and everything else.

Q. Now how much of the form does the nursing supervisor fill out? If you'd take a look at that. For example, who has responsibility for the first section under "Punctuality."

A. The supervisor. Sections 1, 2, 3, 4, 5 including Comments, 6 and 7 are filled out by the supervisor. Quite often, also, overall evaluation is going from excellent to below standard is also filled out. "Continued Employment" sometimes is, sometimes isn't. Then they sign at the "Evaluator." Then the form comes to me. I oversee it. I then send it back to the supervisor. Then she sits down and discusses it with the nurse aide and then the nurse aide signs it.

Q. Now the discussion is—your testimony is that it's between the nurse aide and supervisor rather than between yourself and the nurse aide?

A. Oh yes. Sometimes what will happen is it's all filled out and all signed by the aide. When I get it, all I have to do is just put my "Reviewed By Department Head."

Q. Now how often are these to be done?

A. On employees, on initial hire, after 30 days and then we usually do it 90 days and then annually or prior,



[844] if there is a problem that we're seeing.

(Pause)

MR. BIXLER: Can we have Respondent's 1, please?

(Discussion)

Q. Could you review Respondent's Exhibit 1, Mrs. Cooper, and then tell us if you recognize that document, if so, what it is?

A. This is the job description for a staff nurse that is currently at Heartland of Urbana. This is the set format that we would issue upon orientation to a new hire as a staff nurse coming into the facility as their job description.

Q. Now is this staff nurse position a position you have been referring to as supervisor on shift?

A. Correct.

Q. Now we've also had testimony about a designation called charge nurse. Were you involved in implementing the charge nurse designation?

A. Yes I was.

Q. Okay. Could you tell us what that designation means and how it was used at Heartland of Urbana while you were there?

A. The charge nurse is an additional title without additional duties given to any particular supervisor [845] on any particular shift regardless of LPN or RN. I tried to split the role fairly.

This is a position that is mandated according to long-term care facility regulations which states that in the absence of a director of nursing, a supervisor, one of the supervisors in house will be, in essence, the senior supervisor to handle an emergency situation such as a tornado, an evacuation, something of a grave nature. First and foremost, primarily there was never any addition in duties at all.

Q. So on a daily basis, there would not be any additional duties for a charge nurse?

A. No.

Q. Now, Mrs. Cooper, would you please tell us what your assessment of the nursing department at Heartland of Urbana was shortly after you arrived, after you'd been there for a while, what was your assessment of the nursing department?

A. I felt that there was need for more nurses in the building. The nurses who were presently employed needed guidance and a more structured working environment so they would know exactly if they were able to fulfill their roles. To do more in-service education. To boost the morale of the nurse aides and service staff further. To improve the quality of care, that is direct patient care and also

[871]

**CROSS-EXAMINATION**

BY MS. VAUGHAN:

[886] Q. And you referred to the fact that you were on call 24 hours. Is that what you were on call for?

A. Absolutely.

Q. You were available at all times to be called if there was any problem of any kind?

A. Yes.

Q. Were there any instructions that you gave to the LPNs to not call you on? Were there any—excuse me—Did you give the LPNs or nursing staff any instructions to not call you if it was a certain topic or a certain situation?

A. Not that I'm aware of.

Q. They were free to call you about anything?

A. As far as I'm aware, yes.

Q. But I believe you testified that you saw less—or at least you had fewer personal conversation with Ruby



Wells and Cindy Cordrey—they normally worked at night, is that correct?

A. That's correct.

Q. So you did not have an occasion or as much of an occasion to observe their working habits, would that be correct, as the day shift nurses?

A. The majority of my time was divided between

[960]

**CONNIE THATCHER**

having been first duly sworn, was called as a witness herein, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. VAUGHAN:

[984] Q. Had you ever missed twice in a month prior to—

A. Yes.

Q. —'89 and not been written up? First of all, have you ever missed twice in a month?

A. No, no. Yes, I had and hadn't been wrote up.

Q. Have you ever—okay, your shift started at 7:00 A.M.; is that correct?

A. Yes.

Q. Was there a DON or a ADON that was present that at 7:00 A.M. that you

A. No. No really—

Q. And was there a shift at 8:00 A.M. at that time?

A. Uh-huh

Q. How did those aides receive their—how did they know what to start doing?

A. They didn't until we told them.

Q. Did you ever have an occasion to or did you ever in the middle of a shift have to switch aides around?

A. Yes, I had.

Q. Would you describe how you did that and what happened?

A. Okay. If somebody had to go home say for a doctor's appointment or a child got sick, or they got sick [985] and had to go home then I would just pull one of—if I had—say I had six girls and two was in each section there is usually three sections, then I would just, you know, whichever one is the easier section for that day, you know, I would just pull and put two on one side and two on the other and one in the middle and then, you know, and somebody else—when they got done helping on their side they would just go and help the other girl. There have been times when I would go and help them if I wasn't busy with doctors or whatever.

Q. Have you ever filled out or helped fill out an evaluation for an aid?

A. I think I have once.

Q. Would you describe when that was?

A. Okay, I don't know the day, but it was in March. Sandy Townsend.

Q. Of '89?

A. Of '89.

Q. Have you filled out any evaluations prior to March of '89?

A. No, ma'am.

Q. In March of '89 what happened?

A. Sandy Townsend had brought the evaluations for me, on our side. There was only a couple that I can remember. There were only two or three things I had to fill out and she told us what to fill out and what not to fill out

[987] Q. As far as you recall, you did three?

A. I think I did three of them.

Q. What did Sandy Townsend—what instructions did she give you with regards to those three aids evaluations?



A. She said it was—she said that there was some things that we would fill out and she said where for us to sign it at. Personal appearance, I don't think we were allowed to sign that one. And over here where it says recommended continued employment we couldn't do that. Where it says—I didn't discuss that with anybody. Overall evaluation, we couldn't check those.

Q. Did you do the absenteeism or the attendance?

A. No, I don't think we could do that either because we didn't know what their records was.

Q. What did you do with those—did you do that for those three aids?

A. Yes, I did.

Q. What did you do with the evaluation forms after you filled out the parts that you had been told to?

A. I think she told us to lock them up under the lock up and she would get them later that evening—she would come down and get them that day.

Q. Did you add anything further to do with those evaluations forms?

[988] A. No, that was it.

Q. Did you ever talk to any of the aids or discuss their evaluation forms with them that you filled out?

A. No.

Q. Did you ever—not just limited to March of '89, did you ever recommend that an aid get a wage increase on the basis of his or her evaluation?

A. No.

Q. Did you know whether the three aids that—whether or not the three aids whose evaluations you helped out, fill out, received wage increases?

A. No. I don't.

Q. If you know, who gave the aids their evaluations and discussed them with them, if you know?

A. No, I don't.

Q. Did you ever have an occasion or what would happen if an aide called in and wasn't able to make his or her shift?

A. If I took the phone call?

Q. Did you—who took those phone calls[?]

A. Well, in the daytime—well, usually if somebody called, you know, and wasn't coming into work that day when I got there, then the night nurse had taken the phone call.

Q. What would happen if an aid would call in

[1007]

**CROSS-EXAMINATION**

MR. BIXLER: Has the witness provided an affidavit to the court?

BY Mr. BIXLER:

[1010] it, you know, nobody had changed it or until Linda had came.

Q. You also testified that many, many times you had to take that home to work on, that assignment sheet?

A. Right. Because I was not—like I said, I had not been equipped to do any assignments. I just never did it and you know, I would take them home and work on them because I didn't know what else to do, you know.

I never delegated that kind of work out, you know, It was always done for us. So I would work on it and try—which was the best way trying to be fair to the girls so they wouldn't have a heavier load than the other one.

Q. You mentioned that there was a easier section for a particular day. Would these sections be, I guess, depending on what you were going to do with the residents in that section, the sections each day would—

A. Well, it is not that one section would be easy. It is just that patients got showers twice a week and when they



had a shower day, it was a rush. Those girls were busy on shower days. So you tried not to stick somebody two days in a row on showers. Give them a break. Let them have an easier section, if you want to call it an easier section.

None of them were easy, but at least you wasn't busting your butt. You get them showers done before a certain time to get the people showered, dressed, and up for the day. So I tried to delegate it that way, you know.

[1011] Q. You would work on the assignment sheets at home, about how long would it take you to do the assignment sheets?

A. For me, two or three hours.

Q. Would you do that for a week or a day?

A. I worked on them all week long.

Q. All week long?

A. Yes.

Q. Now, after Linda Cooper came and set up the assignment guidelines that she did, and then you were eventually given a warning related to that, I think you've seen that today; is that still in front of you?

A. Right, yes.

Q. I believe it is General Counsel Exhibit 29.

A. Yes.

Q. And you've already testified about how that came about. Now, after you were given that warning, did you have any further problems with the assignment of aids or did you aids to your knowledge complain about their assignments after that?

A. The only one that complained was Clara Moore that I know of. And she was the only aide that came to Linda and complained that the work load was not fair.

Q. It was just that one time which ended up to be the warning?

[1028] A. No.

Q. The three aides who you participated or had something to do with their evaluations in March, were those the only aides that you worked with?

A. No.

Q. With regard to the—you answered some questions by Mr. Bixler about struggling with these assignments or how to delegate nurses aides to certain patients, why was that such a struggle?

A. For me?

Q. Yes. What was in the decision making that made it a struggle for you?

A. I was just trying to be fair to the girls and make sure, you know, somebody didn't have more of a workload—we had total patient—we had patients that were a lot of care and you know we had some patients that had little care. The section they were put in, sometimes made it difficult because then we had 15 down—it was just—the patients were not—I don't know how to explain—the patients were not in the rooms as the halls went to make it easy. To try to be fair with the girls that somebody didn't have three hard ones and three easy ones. Sometimes they were spread out across the buidling—you know, you might have ten rooms down here that have all the easy ones and all the hard ones up here.

[1029] Q. So, when you went through these—what did you do first, divide the patients rooms into sections?

A. Right, yes.

Q. When you were trying to decide how to divide those patients into sections, what all did you have to consider?

A. I just—if they were like patients that had to have like two people to lift them instead of just one girl to lift them, if it was their shower day, if they were sick, I mean, really sick like if they had tubes or things like that, you know, which we had a lot of those that—where if they



were ill that day and had to left in the bed and had to take vital signs, temperature taken and some with high fevers had more attention, you know, like bathing and things like that those considerations.

Q. Was it primarily trying to decide how much care a patient required?

MR. BIXLER: I object to the leading nature of the question.

Q. What were the primary considerations that when you divided up the sections.

A. Basically, just how much care that patient needed. If it took one person or it took two people.

MS. VAUGHAN: I have nothing further, you [sic] Honor.

[1030]

**RE-CROSS EXAMINATION**

MR. BIXLER: I have just one question.

BY MR. BIXLER:

Q. Your overall objective on working on the assignments and spending as much time as you did, was to be fair to the aides in terms of their workload; is that correct?

A. Right. So that the aides were, you know,—so the aides would not have—one would have to work harder than the other one and to make sure also that the patient got taken care of, too. But just so that the girls would not have to—just to be fair to the girls so one wouldn't have to work harder than the other one.

MR. BIXLER: No further questions.

MS. VAUGHAN: I have nothing further.

JUDGE GROSS: Let's go off the record.

(Off the Record)

**JULIA GOLDSBERRY**

having been first duly sworn, was called as a witness herein, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. VAUGHAN:

Q. Ms. Goldsberry, would you please state your full name and address for the record, please?

A. Julia Ann Goldsberry, 1225 Henry, Urbana,

[1056] Q. Is that – did you ever participate in any other evaluations?

A. No.

Q. I'd like to have the witness shown Respondent's Exhibit Three. Do you recognize that form?

A. Yes.

Q. What is that?

A. That is the evaluation form.

Q. Is that the form that you – to which you were referring when you said you helped fill it out?

A. Yes, ma'am.

Q. What sections did you fill out or were your instructions, first of all, from Sandy Powell as what to do with that document?

A. I didn't fill out the first part about their attendance and punctuality because I had no records here about this. Let's see, as far as how they cooperated with the other people they work with and – personal appearance, I didn't fill that out either. Let's see I didn't fill Sections One or Four and I didn't do anything with the overall evaluation.

Q. What did you do with that evaluation after you filled it out?

A. I gave it back to the assistant director of nursing and she completed it.

[1057] Q. Did you have anything further to do with it after you gave it back to the director of nursing?

A. No.

Q. Did you make any recommendations to management what should or should not be done to that employee on the basis of recommendation?



A. No.

Q. Or on the basis of evaluation – did you make any recommendations as to far as wage increases?

A. No.

Q. Did you ever recommend that the employee be promoted?

A. No.

Q. Do you know what the purpose of that evaluation is?

A. Well, I know the purpose of the evaluations that I have had was to measure a person's proficiency to what they're doing and see how good of an aide or how good of a nurse they are and whether to – whether they should be given a raise or whatever.

Q. Did you ever participate or – with the one you filled out, did you physically give the evaluations to her after it was completed?

A. No.

Q. Did you discuss it with her at all?

[1058] A. No.

Q. Did you participate in the discussion with any aide about an evaluation?

A. No.

Q. Did you ever give any employees their evaluations after they had been filled out by somebody else?

A. Oh, no.

Q. I'd like to have the witness shown General Counsel Exhibit Eleven. I would like for you to look at that Ms. Goldsberry and tell me if you have ever seen that or if the contents are familiar to you.

A. Yes, I remember seeing this.

Q. How did that apply to your job?

A. Well, it really just told me how I was supposed to divide up people – the patient load for the aides.

Q. Did that differ from the way that it had been done in the – prior to that memo?

A. Not a whole lot.

Q. In any way that you can think of or did you follow those instructions after you received –

A. Yes.

Q. – the contents of Eleven?

A. Yes.

Q. What did you do? Did that make a change or [1102] requested for you to take her out of turn, and I have no objection.

MR. DUNPHY: I would just also ask the record to reflect that we have discussed this with Mr. Bixler and he does not object to taking this witness out of order.

MR. BIXLER: That's correct.

JUDGE GROSS: Thank you Mr. Bixler.

**SANDRA TOWNSEND**

having been first duly sworn, was called as a witness herein, was examined and testified as follows:

**DIRECT EXAMINATION**

BY MS. VAUGHAN:

Q. Would you state your name and spell your last name?

A. My name is Sandra Townsend, T-O-W-N-S-E-N-D.

Q. Where do you live?

A. I live at 3730 Cemetery Road in St. Paris, Ohio 43072.

Q. How are you currently employed?

A. I'm employed as a Registered Nurse, Staff Nurse at Eaglewood Care Center here in Springfield.

Q. How long have you been employed at Eaglewood?



A. Since May the 1st.

Q. What is your educational background?

A. I attended Clark – first I attended

[1108] THE WITNESS: I asked Linda – well, prior to Linda Cooper, I asked Brenda Stabile and after Linda Cooper came I also asked her because Linda or Brenda had told me no and –

JUDGE GROSS: Brenda?

THE WITNESS: Brenda Stabile.

JUDGE GROSS: Said, no, what?

THE WITNESS: No, that I could not have the nurses do the evaluations.

JUDGE GROSS: Thanks.

BY MR. DUNPHY:

**DIRECT EXAMINATION**

Q. At some point did you get the agreement of Brenda Stabile to allow nurses to be involved in the evaluation process?

A. Yes. We had some complaints because their evaluations weren't being done. It was a timing error and I was working shifts, I had been off ill for three weeks and – so I asked them – well, before I was ill also I had gotten behind and I asked them if I could not have the nurses do – help with the evaluations and so finally they agreed that they could do a portion of the evaluations.

Q. By they, who are you referring to?

A. Brenda and Linda.

MR. DUNPHY: Your Honor, I would like to have [1109] the witness look at Respondent's Exhibit Three?

BY MR. DUNPHY:

Q. Have you ever seen this type of document before ma'am?

A. Yes, this is our evaluation that we used down at Heartland of Urbana.

Q. What conversation did you have with Brenda or Linda pertaining to what portions of this appraisal were to be completed by the nursing staff?

A. Well, the—they could do the human relations, cooperates, courtesy and friendly, controls emotions, attitude toward work, Number Four, Number Five, Number Six and Number seven.

They could not do the overall evaluation, they could not recommend for continued employment, they could not put punctuality, Number One which involves tardiness, attendance, returns to breaks and lunch on time, et cetera, et cetera.

That came from the—the attendance part came from the front office. The overall evaluation was by me or by Linda Cooper and the—they weren't—they signed them as the evaluator and then the department head, the director of nursing, be it me or Linda Cooper, sign, and then the administrator signed and then I gave them to the individual employee.

[1110] Q. Were any of the nursing staff at all involved in—did you have some discussion with the employee after that process was completed about the evaluation where they had an opportunity to—

A. Right.

Q. —provide some comments?

A. Right. On the back they have, you know,—because they signed this I told them it did not need immediate—it did not mean that they agreed with the evaluation necessarily. But they had—that they had to sign it that they had seen it.

If they refused to sign it, I had a witness sign that they refused to sign it. Then on the back they could comment



any way they wished in their own handwriting whatever they wanted.

Q. Did any of the nursing staff participate in those meetings with yourself and the individual nurses aide?

A. No.

Q. How did you know what portions the nursing staff was permitted to fill out on a form such as Respondent's Exhibit Three and which parts they were not able to?

A. I was directed by Brenda Stabile and also by Linda Cooper.

Q. Now, regarding the evaluation of nursing

[1147]

**RUBY WELLS**

having been first duly sworn, was called as a witness herein, was examined and testified as follows:

**DIRECT EXAMINATION**

[1185] Q. Did you ever recommend that to management?

A. No.

Q. Are you familiar with a form that is called a counseling form?

A. Yes.

Q. Did you ever fill out a counseling form with regard to another employee?

A. Yes.

Q. What was the circumstances, can you give us an example when you did that?

A. One was an aide that I had been getting reports from the other aides that she wasn't doing her work. She was double—what they call double padding, putting more pads under a patient than what they should. We had one patient that would break down and get gaulded real

bad in his groin. He was to be left open to air and she was putting two and three pads underneath and pulling them up between his legs and that kind of stuff.

Q. Approximately, when was that?

A. I'm not–

Q. Was it during 1988 or during 1989?

A. Yes, it was during 1988. I don't remember exactly. Probably, like I say I'm not sure, probably around August.

Q. What did you do when you found out that she [1186] was double padding a patient?

A. I wrote up what I found on the counseling form and I talked to the aide about it.

Q. What did you do with the counseling form?

A. I put it in the box outside of the DON's door.

Q. Did you–

A. Or under the door, one of the two.

Q. Do you–did you do anything further after you turned in the counseling form and talked to the aide, did you do anything else with regard to that counseling form?

A. Other than–if it was like–I don't recall or remember whether it was brought up or not. But if it was brought up, like I may have said something needs to be done.

Q. Do you recall whether or not any kind of disciplinary action resulted through that aide?

A. I don't know.

Q. You just don't know?

A. I don't know.

Q. Did you make any recommendations with regard to this disciplinary action or further action with that counseling form?

A. No.

Q. Is that a No?



[1246]

**PROCEEDINGS**

MR. BIXLER: Your Honor, we would call Gloria Clore, as our next witness.

JUDGE GROSS: Good morning, Ms. Clore.

(WITNESS SWORN)

**DIRECT EXAMINATION**

BY MR. BIXLER:

Q. Ms. Clore, would you state your name and address, for the record, please?

A. My name is Gloria Clore, and I live at 4801 Flatfood Road, Bable, Ohio.

Q. Bable?

A. Yeah.

Q. How do you spell it?

A. (B-a-b-l-e).

Q. Okay. By whom are you currently employed?

A. Heartland of Urbana.

Q. Okay, and how long have you worked for Heartland of Urbana?

A. Since January the 12th, 1989.

A. Okay, and you're still employed out there today?

A. Yes.

Q. Okay. What position do you hold at Heartland of Urbana?

[1247] A. I'm a charge nurse on A Wing.

Q. Charge nurse on A Wing?

A. Uh-huh.

Q. And how long have you had that position?

A. Since the first of May.

Q. And prior to the first of May, what position did you have?

A. My class—job classification was treatment nurse.

Q. What were your duties, briefly, as treatment nurse?

A. I had to take care of the treatment on A Wing 13 and B Wing.

Q. Okay. And did you work all the time as Treatment Nurse, or did you work in some other capacity?

A. When needed, I'd work as a Charge Nurse, if somebody called off sick.

Q. A Charge Nurse, is that the same as Staff Nurse, if you understand my—

A. Yes.

Q. Okay, you were a nurse on the floor?

A. Yes.

Q. What wings did you fill in and work on?

A. I have filled in on both.

Q. A or B?

[1248] A. A or B, uh-huh.

Q. Were you working any particular shift?

A. Days, seven to three.

Q. Okay. Were there 12 hour shift sometimes at Heartland of Urbana while you were there?

A. Yes, when I was there until A Wing changed to eight hours, the first of May. And I believe B Wing changed to eight hours the first of June.

Q. What hours did you work as treatment nurse?

A. Usually seven to three.

Q. And when you worked on the floor as staff nurse, what hours did you work?

A. Seven to seven.

Q. And currently what hours do you work as floor nurse?

A. Seven to three.



Q. Okay. Now, I'd like to ask to some questions about your responsibilities as floor nurse and charge nurse—

A. Uh-huh.

Q. —and I'd like to direct your attention to the area of job assignments, would you describe what your responsibilities are in the area of job assignments?

MS. VAUGHAN: Your Honor, I'm going to object—to testimony about what her responsibilities as [1249] charge nurse are since she's just come to that position on May 1, '89—I think that was after the discharges. And, I think the pertinent period here is prior to the discharges and what positions they held in the winter of '89, what the duties of the charge nurse were. It seems to me that there's been some testimony that there were different policies implemented and with regard to the duties then I think that might be very critical.

JUDGE GROSS: I'm going to overrule the objection, but I'm sure that we need a few answers met on—

MR. BIXLER: Right.

JUDGE GROSS: —testimony through that period.

Q. Okay, on that issue, let me ask you a few questions. You worked as a charge nurse or floor nurse, prior to May 1?

A. Yes.

Q. Okay. And you've worked as a charge nurse or a floor nurse since May 1, full-time?

A. Yes.

Q. Okay. Now, have your—in what way, if at all, have your duties changed from the time you substituted as charge nurse on a periodic basis to now? Could you tell us whether they have, and if so, in what [1250] way?

A. The only thing I think there, is when I substituted at each station, there are assignment sheets, set up by whoever the full-time nurses are. And so when I substituted, I would take their assignment sheets and

assign aides proportionately to those sheets. Where now, I make them up myself, you know, and make corrections myself.

Q. All right. Now, did you know what the charge nurse's [sic] did in the area of job assignments prior to the time you became a full-time charge nurse?

A. In what? It's the same.

Q. Okay, were there—let me ask you, with the work that you did as a charge nurse after May 1st, was the same as or different than what you would have done, if you'd have been a charge nurse prior to May 1st?

A. As far as I'm concerned, it's the same.

Q. Okay, were there—were you aware of any specific instructions that the Director of Nursing had put out for charge nurses or floor nurses in the area of job assignments that effected [sic] the way you did the job assignments after May 1st?

A. No.

Q. Would you then go ahead and tell us how you handled the job assignment responsibility, in your [1251] current position as floor nurse?

A. Okay. We have assignment sheets and you have so many people on your wing, and depending on whether you have five or six aides, I have some for five men assignments and some for six man assignments. The only—you start like at A1 and you come around at through A26. And the only thing I do different—

Q. Those are the room numbers?

A. Yes, uh-huh. There's 49 on A Wing, 49 residents on the floor. The only think I differentiate in, is that if there is a section that has a lot of what we call, "Total Care," so maybe I got 1A and I've got 1B. One might have the aide—I don't have my assignment sheets here with me.

And maybe there's eight people that are real heavy, you have to do everything, in other words. Maybe they don't



even ambulate. For 1B, I have some that will ambulate theirself, so what I have done on my assignment sheet is, you might have the first person in Room 3, Section 1, but both of those people are total.

So what I have done is the person in Bed Two, I have taken off and turned over to another assignment and only a couple like—that would be make it more even, so that one person don't get stuck with eight heavies, where the other one has got maybe four people that are [1252] ambulatory, and I try to even it out. But other than that, the assignment sheets would stay about the same.

Q. Okay. Now, do you actually work on the assignment sheets for a projectile number of days, is that what you mean?

A. Yeah, and I try to—my aides never have the same assignments, except maybe accidentally. I try to rotate them so that they get the feel of all the residents.

And then they get showers two days a week, each resident in there. So, my aide, I also see that they have showers twice a week, because I like to make it so nobody—shower day is heavier than a regular day. It it [sic] stands to reason that people get down on shower day, so I try to keep it even so nobody gets overloaded on one thing.

Q. How often do you work on these assignment sheets?

A. Well, of course, you have to work on them when you have room changes, someone passes on or someone is discharged, then we—I have masters, and I update my masters, and make new copies. So that, on the floor, there is assignment sheets when they come on duty.

Q. Okay. So, do you have to work on the assignment sheets on a daily basis or not?

[1253] A. Not usually, sometimes there are, because like I had one yesterday that I had to change, because now we

are—she used to feed herself, and now she's dependent, because her condition has worsened.

So, I did change that, I put a "D" up there, where it used to have an "A" and instead of, "Feed table," I put that she eats in her room, because she's on oxygen, we don't get her out of bed right now.

Q. So, is it correct that the treating level of the residents can change periodically?

A. Oh, definitely.

Q. Does that effect the assignment of the aides?

A. Well, yeah, because it might, I mean, if you got four that did for themselves and all of a sudden they're becoming harder, then you might have to make some changes. They'll usually bring it to my attention and I make the changes.

Q. Okay, assuming that you have—what would be a full staffing on the seven to three shift in terms of aides on your wing?

A. Six.

Q. And could you tell us how you would handle the job assignments for six aides? If you had six aides, how would you go about assigning each of the aides?

A. Well, like I said, I'd have six sheets, and [1254] that's in my six person, I guess, six man setup, and each one has a place at the top for the date and the name and also tells them their break and what duties they do.

And I just take and write their name on it and the date, and then I kind of got like a master thing, and I make sure they aren't—like I said, once in a while I do, but I try not to give them the same assignments two days in a row. I make sure—I circle the days they have showers, so I know how many times a week they've had showers.

Q. On the sheet would you list the residents' rooms or the residents' names?



A. It has like six is the room number, and the first person's in Bed One, the next person's in Bed Two. It has their first initial and their last name. Then it goes across and tells you what has to be done with each one.

Q. Do you do that for each day?

A. No, it's a master sheet, and I have copies made. And then it just has the room for the person's name that's got that assignment and the date at the top.

Q. Okay. And that, what would be—what I'm getting at, is that changed everyday or does that cover a month or a week or what period of time would that cover?

A. Each day they get a sheet and each day they [1255] use that sheet and they turn them back in to me. And at the end of my shift, I staple the five or six or whichever I had on duty together, and I put that in the Director of Nursing's box. So each day there's a new sheet, we don't use the same sheet over and over, is that what you mean?

Q. Yes.

A. Okay.

Q. And then the next day, would it be your testimony that you would rotate the aides' assignments?

A. Yeah.

Q. Okay, and would there be situations where you would have to change the particular assignment because of the acuity level of the patient?

A. Yes, I had to do that not too long ago, on the back, the back hall, because there were a couple of heavies. So, I brought the one heavy over to the other one that isn't as heavy. But it normally is not necessary everyday.

But like if I was working today and at the end of the shift somebody said, "This section's getting too heavy." Then what I would do is make that change. I'd just draw a line through it off the one sheet and put them on another sheet, if that's what's needed.

Q. Okay. So the assignments of the residents to

[1256] the aides would not be—would not necessarily be one room right after another?

A. No.

Q. —or grouped together?

A. No.

Q. Okay.

A. Now some areas are, but if there's an acuity problem, then I do intermingle, you know. It depends on whether you've got six or five men, too.

Q. Okay. You mentioned break times and lunch periods, how's that—do you—how's that handled with respect to the aides?

A. Okay, on the top of the assignment sheets, like I said, there's a date, and then room for the name. And then up here at the top, I either put first or second, and that designates your break, and also your lunch.

Below that I put "DR" which means that particular aide has the dining room. "FT" means that aide goes down to the feed table and feeds the people at the feed table. And "FL" means that aide stays back on the floor, passes trays and feeds people back there.

Q. Okay. So that's all part of what's on the assignment sheet that you give the aides?

A. Yeah, right, from the minute they pick it up, [1257] they know what they've got.

Q. All right, for an aide who's responsible for the feed table, the "FT" what would her duties be when she's assigned to the feed table?

A. Okay, usually see, they'd go to lunch about 11:00, 11:30. And then when they get back from lunch they have to start taking the residents down to the area, where they're fed.

And then the dining room announces, "Second dining room being served," and that means that they go down,



and then they take the trays from the kitchen window over to the residents.

The ones that are able to feed theirselves, they take the lids off, you know, and set them up. And then they actually sit down and have to feed the ones that are incapable of feeding themselves.

Q. Now, would there also be aides who are assigned to the dining room who are not actually doing the feeding?

A. Yes, that's the one that—on my end, that's the one that has 1A. I just set it up when they have 1A they know to go to the dining room.

And they announce, "Dining room's being served," and then this aide goes down there, and she sees to helping uncover the stuff that they need. Also tracking, [1258] on a list we have, of how much everybody eats, how much they've ate that day. And she has to stay in the dining room and observe and help until everyone is transported back out to their rooms.

Q. So she doesn't have any specific responsibility for feeding the residents?

A. No, because she's in the area now, after the dining room is cleared, and everybody's back. See the people in the dining room eat first. And there is some time between that, when she's done and everybody's out. Then I do ask her to go over and pitch in with helping with the feeds.

Q. Okay. And then I believe there was another category that you mentioned, "FL"?

A. That means floor.

Q. Okay.

A. That means that after you eat lunch, instead of going to the feed table or dining room, you are responsible to pass the trays, and then to feed the people that you're not able to take them down to the feed table.

Q. Okay. Now, have there been situations, while you've worked as a floor nurse, as a staff nurse, that an

aide needed to go home early before the end of the shift, for some reason or another?

[1259] A. Uh-huh. Yes, it doesn't happen very often but, yes.

Q. Who do they come to see to get permission to go home if they have to leave early?

A. To me.

Q. Can you recall a specific situation, where that happened?

A. Well, yes, just last week it happened, it was on three to eleven but the aide that had come on wasn't feeling good. And I told her to take her temp. And she did have a slightly elevated temp.

And she had been having some problems. She's new, and the doctor told her if she had this problem to come to the emergency room.

So, after she took her temp, I did have her go ahead, and I wrote out a thing stating that she was leaving early. And I asked her to please bring a slip back from the doctor stating what he had specified.

Q. Did she bring a slip back from the doctor?

A. I don't know, because she's on three to eleven, I'm sorry.

Q. Did you have to sign her time card in that situation?

A. Normally I would, but she may have taken it to a charge nurse. This was after my shift was over and [1260] I was still there, you know.

Q. Can you recall any other situations that you've had where an individual on your shift who you were—an aide who worked on your shift who had to leave early?

A. Yes, I had an aide that wasn't feeling good. I don't remember the time, but she just didn't, she kept not feeling good, and she was having some vomitus. And she hung in there until after lunch.



And if they can, you know, if they aren't sick and running a temp, if they can help until you get the majority of the stuff done.

And then she did go home. She did bring her time card and I initialled it, that she had left early. And everybody just pitched in and took over on her assignments.

Q. Okay. Do you recall the name of the aide?

A. I'm thinking it was Clara Moore, but I wouldn't be real sure.

Q. Okay, what did you do for the rest of this shift in terms of her assignments?

A. Before she left I asked her to go ahead and fill in her flow sheets that she could, at that point. And then we left her assignment sheet lay up there and I asked everyone—the main thing is in the afternoon, if [1261] somebody has a bowel movement or urinates, you have to track how many times on their individual patient flow sheets. And I asked the girls, any that she hadn't already charted, if they had any bowel movement or urination after that, to mark it on there.

Q. Okay. Have there been situations where an individual, on your shift, has had to work overtime, beyond the end of the shift?

A. I don't recall it happening. Usually we have enough staff coming in, we really don't have that problem, you know.

Q. Have there been situations where aides on the eleven to seven shift have had to work overtime on to your shift, that you can recall?

A. No.

Q. So you have not had to approve any overtime for any aides?

A. I'm just trying to think the times I've signed cards. I did have to call somebody in the other day when

somebody called off sick. And I signed her card when she came in. I don't recall any right now, other than that.

Q. Okay. Describe that situation, you just mentioned, when you had to call somebody in, how did that come about?

[1262] A. As I recall it was a young lady that had to leave. Earlier in the day an aide that works three to eleven had called me and told me that if they needed her she could work today.

And so I called her at home and I told her, could she come in. And it was a little after three and she got there about 4:15. So, as I was leaving then, she asked me if I should initial her time card. And I said, "Clock in, and then I'll initial it."

Q. Okay, you were still there at 4:15?

A. Yeah.

Q. Okay—how come?

A. Because sometimes by the time I get everything done that I have to do, then, after I give a report, I take care of my charting that I'm too busy, sometimes, to do through the day.

Q. If an aide on three to eleven is not going to be able to come to work, who would she call? Well—yes, who would she call to report that she's not going to come to work?

A. Sometimes they call direct to the wing and I get the message. But, evidently, other times they must ask for one of the office personnel, because I'm not aware of it.

Q. Okay, when that call does come in to you, [1263] what do you do?

A. I make out an absenteeism slip and if it's through the week, Monday through Friday, then I take it down to the director's office, because she has the overlaid schedule.



And if it's on the weekend then I proceed to call the pool and see if they can give us a replacement.

Q. Okay. Would you try to call nurses who are not scheduled that day or aides who are not scheduled?

A. It depends on how many days they've already worked. And I usually try, but a lot of times you can't get them or they say they can't come in and then I always revert back to the pool.

Q. Are you authorized to call the pool directly, yourself?

A. Yes.

Q. Okay, when did you get that authority?

A. I—I've just always had it, as far as I know.

Q. You've had that authority since you began working there, if it was necessary?

A. That's the way I feel, yes.

Q. Okay. Have you—do you have any responsibility in the area of training aides or orienting aides to the floor?

[1264] A. To a certain extent when we have a new orientee, they have an orientation service they put them through. And I guess my responsibility is, when they are new, we call them an orientee, I usually put them with one of the aides that I feel does the better job to work with for the week or so, kind of as a shadow, to help out and to get on-hands, that type of thing.

Q. Okay, do you have any responsibility on an on-going basis as to training or in-service of the aides that are already on the staff?

A. Probably as far as in-service means, no. To make sure they're doing what I expect of them, yes. If I see something going wrong then I'll call a little impromptu meeting. And I'll tell them I have seen this and they've got to change it.

Q. Can you recall a specific example when you've had to do that?

A. Oh, mine's probably more nit-picking stuff. If I find a lot of residents that don't have water pitchers within reach or at least a glass of water then I'll bring this to their attention, and tell them that it has to be within reach. And, like a call light, if I find it not where it should be, I just call them up and say we have to correct this policy, you know.

Q. Okay, are there situations that develop on [1265] the floor in which there may be a conflict or dispute that arises between two employees?

A. Well, you have—you always have that when you have people working together, conflicts, yeah.

Q. Has that happened on your shift with aides that are working under you?

A. I've had a couple of occasions where—that something like this has happened and a lot of times I tell them to try to talk to the other person, what they're feeling and if they can't clear it, then, you know, I just make sure they each understand what's expected of them.

Q. Can you recall a specific situation that arose where you may have had a conversation like that with one or more aides?

A. I just do it without thinking so much—well, I did have a problem with some aide had body odor, you know.

Q. Well, tell us about that situation.

A. Well, a couple of my girls said that they felt I ought to be aware of something, and they said this one aide was having offensive body odor.

So, later in the day I asked her if I could speak to her. And we went around, and I said, "I think maybe—I don't know how to tell you this, but I think maybe [1266] you have to be more careful in the morning and maybe use deodorant." And she said, "Me"? And the next time I smelled her she had put some on, she smelled like a rose.



So, I mean, it was kind of bad, I didn't know, but I felt I had to take care of, they said something. And a resident the other day that was just in visiting and the resident said something to me. And I said, "Well, I'll have to talk to her again."

Q. So the situation originally arose because a couple of aides had come to you—

A. They thought that I ought to be aware of the fact that she had offensive body odor.

Q. Okay. Are there other problems that have arisen, from time to time, between the aides that you have had to intervene on?

A. Well, sometimes we just have had somebody think that somebody else can do something better and you just make sure—the way I handle it, is a lot of times I have a little impromptu meeting. And I say, "This is the way things are going to be done." And usually, I think, with me approaching it as a group the person usually catches on and it seems to right itself—

Q. Okay.

A. —you know.

Q. Where would you have the impromptu meetings?

[1390] MR. BIXLER: Our next witness is Ruth Wilcox.

(WITNESS SWORN)

**DIRECT EXAMINATION**

BY MR. BIXLER:

[1396] A. Yes, sir.

Q. Okay, could you tell me, saying in the last three or four years, how many programs you presented at Heartland of Urbana, to the best of your recollection?

A. I could refer to my notes, I know on the management and supervisory issue I have given two programs at

the facility and then I did a residential program that people from the facilities, nurses from the facility came to, at another location.

Q. Okay, do you recall when the last management supervisory training program was that you gave at the facility?

A. I believe it was November the seventh.

Q. Of?

A. '88.

Q. Of last fall then?

A. Uh-huh.

Q. Okay, and prior to that did you give another management and supervisory training program at the facility?

A. Yes.

Q. Okay, do you recall what –

A. That was in July of '84, it's the day our plane, the corporate plane crashed, I was there finishing up the program that day.

[1397] Q. Do you recall if that was July of '86?

A. Yes, it was, '86, right.

Q. Okay, and then you gave another program not at the facility but –

A. Uh-huh.

Q. –to which some employees at the facility were invited?

A. Uh-huh.

Q. Do you recall when that program was?

A. No, sir, I don't recall that date, I didn't look it up.

Q. Was that program also a management supervisory training program?

A. Yes.

Q. Okay. Now, if we could refer back just to the one that was done last November of 1988, could you describe



the format, how long it had last, where you held it and so forth?

A. The program is divided into four major focus areas, and I adapted the delivery time to the needs of the facility. As I tell whoever is requesting it, I know this material so I don't need to do it for me, it's whatever they need, and it's generally about two hours for each one of the four sections, and I was all day at Urbana.

[1398] The first section is on supervising and management, just what is a leader, how do you define a leader, what is a leader supposed to do, a supervisor, a manager, and those three terms are interchangeable.

Q. Okay, so you spent one day at Urbana and gave the presentation throughout the entire day?

A. Yes.

Q. And it was broken down into four parts?

A. Four parts. And I don't recall the exact time frame, sometimes I do this in like oh, four hours, and then have another group, sometimes I do it for an hour and a half or two hours a week or a month apart.

Q. And can you recall what you did at Urbana last summer?

A. No. No.

Q. But you did make a presentation?

A. Yes, see I'm on the record doing this five days a week in 22 states, I'm not senile, I just have a dead overload, it's hard for me to recall.

Q. Now do you have hand outs or materials that you will speak from?

A. Yes, sir.

Q. And could we have these marked as Respondent's 24? There's two copies.

(Whereupon, Respondent's Exhibit 24 was marked [1399] for identification)

A. This is the packet, what it looks like, it's in a blue folder.

Q. Let me stop you for a second, let me show you what we've officially marked as an official exhibit –

A. Oh, okay.

Q. – for these proceedings, and then ask you if this is the same thing?

A. Okay.

Q. I will show you what we have marked as Respondent's Exhibit 24 and ask you if that is the material that you passed out at the supervisory seminar at Heartland of Urbana in November of 1988?

A. Yes, sir. The one thing that's new in this packet here is on communication, some additional material, but that's the only thing that's been added.

Q. Ms. Wilcox, could you describe, for us, the seminar, how you handle it, are there lectures, overheads, exactly what, how do you handle it when you present –

A. Yes, it's pretty informal. Again, my focus is that, hopefully, I'm doing it to help them. And so I like for it to be informal where they can ask questions or we can pose problems that they particularly face in management supervising.

[1400] The first thing is to stress the importance of being a good supervisor and what it is. There are two things that a nurse needs to focus on, first of all is the mission, which is taking care of patients, that's the most important thing. And the second, equally, and it should be balanced, hopefully, is taking care of your troops, taking care of your employees. And we don't like to do either one to the detriment of the other.

And the only time you sacrifice, if you will use that term, the employees, is when patient care is at risk. And I suggest if it's Christmas Day and all the employees want



off Christmas Day the mission comes first, the mission is more important than any one individual.

Q. Now when you gave the seminar in November of '88 at Urbana, which job classification of employees was the seminar conducted for?

A. That was for nurses.

Q. That was for nurses?

A. Uh-huh.

Q. That means the RN's and the LPN's?

A. Yes, there's no distinction between RN's and LPN's, the only time that there might be would be in a clinical area where the clinical task might be different.

Q. Now you testified that the program is broken down into four parts?

[1401] A. Uh-huh.

Q. And I don't want you to relive the lectures here, but could you – if you want to refer to the exhibit, you may do that also –

A. Do I need to use this or –

Q. I think you can use your own notes

A. Okay.

Q. And I'd like you to give us a synopsis of each one of the sections of the, the synopsis of the information that you present at the seminar.

A. Okay, what is leadership and what is supervising.

Q. That's one?

A. Yes, and it covered getting the job done through people, and the role model that you serve, how people pay more attention to what you do than what you say. What you do speaks so loud people can't hear how much you're saying and people don't care how much you know until they know how much you care and that's the theme. Old down home saying the brown smelly stuff runs down hill.

If the aides aren't doing their job, you got to look at the nurse that's supervising them.

Q. Okay.

A. And that if there's trouble you need to look at that first supervisor, then.

[1402] Q. Now, looking at your outline under Part One, there's a section entitled, "Styles of Leadership," what, just in summary fashion, can you tell me, briefly, what you'd address in this subject?

A. Well, I asked them, there's autocratic, democratic—and I begin by asking them, "How many of you, when you got through nurses training said that you wanted to be a supervisor and how come you're a supervisor, was it by default?" And most of them laugh and say, "Yeah, probably." And I ask them, "How many of you would consider themselves aristocratic management supervisors?" And usually no one raises their hand. Then I give them the example if a patient codes, do they stand around and vote on it.

Q. What does it mean by, "Patient codes"?

A. If a patient has cardiac arrest. As a supervisor, as a leader, health care is not democratic—we don't stand around and vote on it. We don't vote on procedures that we want to do this procedure but not that procedure.

Sterile technique, infection control, health care is a very autocratic management system, there's one way to do it and there's policies and procedures. I use the example of medication, the doctor orders .25 of Lanolin. You don't say, well, the patient doesn't look so good [1403] today, I'll give him five. It's very autocratic, it's very specific, you give exactly what you are told to do, when to do it and how to do it. So we talk about if you are not autocratic you need to strengthen that part. And then these the democratic and the lasic there. And then the fourth one I



call it crazy making, which is the inconsistent—

Q. Okay, under the subheading of, "Problem Styles," what would you refer to there?

A. Well, there's some titles to different problem styles, "One of the boys and one of the girls," is where the supervisor wants to be such a part of the pier [sic] group that they can't separate themselves and direct them.

Then there's the, "Fireman," the person who doesn't plan ahead, waits until the code happens, and then they run around and say, Oh my god, my drug box has been used or the suction machine isn't where it should be or the oxygen machine is empty, that's the waiting until problems, the surprise fireman, and there's a long list of those.

Q. And you review those in the summary?

A. Uh-huh, and then they have the handout that describes that.

Q. Okay. We're not going to go through each [1404] one of these, but under, "Measurement of good supervising," what does your lecture consist of?

A. It consists of—I can, I teach how they can tell if they're doing a good job and you can do it by sitting at the nurses desk, and you measure four things, and this can be in any kind of climate, anywhere, any time, it can be in a factory, but it's still the same four things that you measure.

First of all you measure moral, and then we discuss, we have an open discussion on how do you measure moral, what do you look for, and that's, are people friendly, do they get along, do people smile at each other, are they helping, is it a team? Then there's the group spirit, is it all for one and one for all? Do you see people reaching out to help each other?

Then there is discipline, I can measure discipline, and I don't mean the number of writeups in their personnel file,

–but do people do the right thing because it's the right thing to do?

Do people answer call lights? Everyone in the facility should answer call lights. That's a patient saying help me. The right thing to do is when someone calls for help is to go see what they need.

If there's trash on the floor, any job that needs to be done, we do it, that's the right thing to do that, [1405] and that's a well disciplined person.

And then the fourth thing is performance, and then we go over the measurements of performance, that's incident reports how many of our patients develop bed soars [sic] after they come in, what's the infection control rate, what's our death rate, how many of our people die from poor care, how many of our people get well, how many fire us and hire someone else to take care of them, quality assurance scores and the State and Federal Survey scores, that's the measurement of performance.

Q. Okay, could you skip over to Part Two–

A. Uh-huh.

Q. –of Respondent's Exhibit 24?

A. Uh-huh, "Communication."

Q. And on, "Communication," and give us a synopsis or summary of the lecture you deliver on communication.

A. Okay, why is it so difficult, I know you think you understand what it is you thought I said but what you heard ain't really what I meant and I expand on how in communication there's the sender the receiver and the message, but the most important communication tool that you have is your own behavior.

If you're a team player, if you believe in the cause, and you have enthusiasm, are you proud? I'm proud [1406] to work in a nursing home, so that's the message. I'm proud to be where I am, it's a good calling, it's a good career, and it's one that is meaningful, and you communicate that.



And then we discuss how do you talk to a person. I use some transactional analysis techniques in really talking to someone but the main message is people don't care how much you know until they know how much you care, and ways of communicating that, and helping the non-verbal communication, again, it's the behavior, the way you dress, the way you look. We go through some body language, and then listening and listening skills.

Q. Okay, now when you're presenting these programs, is it just your lecture or what else is happening during, throughout the program?

A. No, it–I would say a good portion of it is lecture format but we have discussion.

Q. Uh-huh.

A. And giving examples of aide behavior that you might want to address. For instance, what you communicate when you're–say you're passing medications and something is not being done right for the patient that the aide is supposed to be doing, there's a way of standing with your hand on your hip and pointing your finger and giving an order and then there's the way of [1407] saying come here and let me show you how to do this and that role.

Q. Okay, so the participants would have an opportunity to ask questions–

A. Uh-huh.

Q. –of you?

A. Uh-huh.

Q. And have discussions?

A. Sure.

Q. And discuss back and forth?

A. Sure, we'd be in kind of a setting like this.

Q. Would you move on to Section Three, Part Three of Exhibit 24, and would you give us a summary or synopsis of the liability of the supervisor section?

A. Yes. Quite a bit of this, because this is designed from, at this facility, on this particular day, it was designed for nurses, I cover liability of the nurse as well as the supervisor and a supervisor is always, every person is always responsible for their own behavior.

Then, as a supervisor you're responsible for proper supervising and if people are following policy and procedure, you're home free, if they're not following policy and procedure and they're deliberately disobeying, you have a responsibility and you're liable for proper [1408] supervising, teaching and holding them accountable and doing the disciplinary process.

If they're off someplace doing something and deliberately breaking the rules, you're back over here where we talked about leadership, over the long run you teach your employees I will know if you do it wrong, I may not know it at the moment but I will find out.

So that's it, you're liable for proper supervising, you're liable—I think one of the stressors, one of the things I stress is that you're responsible for, if you see something that's been being done that shouldn't be done that if you address it right then—

Q. Can you give us an example of that?

A. A negligent assignment.

MS. VAUGHAN: Excuse me, I'm going to interpose an objection. Excuse me, ma'am, I'm going to interpose an objection. It seems to me, I mean this is all very interesting, but it seems to me like perhaps we carried it far enough to get the point. If the point is that there was such a seminar conducted at the facility with employees, on the general topic of leadership and supervising.

MR. BIXLER: Well, it's management, it's supervision management. We have one more section to [1409] do, Your Honor, and I don't, you know, we—



JUDGE GROSS: Okay, go on Mr. Bixler.

MR. BIXLER: Go ahead.

A. Okay, anyway, they're responsible for making the assignments, they're following up that the assignments are done. And that if things are not being done properly, they need to correct it right then.

And one of the questions that traditionally comes up is that, you know, I don't know whether, where they are in the disciplinary process, and the instruction is that you deal with the problem right that minute.

You can do the paper work later, it can wait until you can look it up in the personnel file and find out are they going to file the warning or is this a verbal, has the person ever been taught? But you always deal with the problem when you see it and tell the employee, this may result in a write up, I'll have to check the personnel file, then the—

Q. Are you talking about the last section now, on discipline?

A. On discipline.

Q. Okay, all right.

A. But that is on what they're liable for doing is addressing the problem.

Q. Uh-huh.

[1410] A. Proper supervising.

Q. Okay.

A. Then we go into the disciplinary process.

Q. And that's the fourth section you outline?

A. Uh-huh.

Q. Okay, would you give us a summary and synopsis of the information you provide on discipline?

A. Well, we talk about where discipline comes from, what that word means, and I differentiate between being mean to people and correcting a behavior, the steps that you take in improving work habits.

And there's a handout on the rules for reprimanding, you know, do it in private and don't do it in anger and that you really want to change the behavior. And that you don't compare an employee to other employees but to the standard.

Some key points to effective discipline, I review employee contact form, and then the steps in the grievance process, discuss if they, if their discipline results in an employee being fired, how to prepare for an unemployment hearing, NLRB Hearing. And then good qualities of an outstanding supervisor is my summary.

Q. Okay. Now, that was a summary of the program that you presented at Urbana in November of 1988?

A. Yes, sir.

[1411] Q. And again who was the audience in that program?

A. Nurses.

Q. Do you recall approximately how many nurses attended that program?

A. I couldn't give you an exact number. Recalling the way that room looks probably seven or eight, somewhere—

Q. Now did you leave any of your handouts at the facility for the nurses who did not attend?

A. Yes, sir, I always leave—I usually take a box of 25 and what we don't use, they are left there for other nurses that they want to give it to.

Q. And are these presented at the seminar in a blue folder like the other ones?

A. Yes, sir.

MR. BIXLER: Okay, Your Honor, I would move the admission of Respondent's Exhibit 24.

MS. VAUGHAN: I have a couple of questions, Your Honor.



**VOIR DIRE**

BY MS. VAUGHAN:

Q. I believe you said that something had been added recently, something on Communication?

A. Yes, something on—

**STAFF NURSE**
**JOB DESCRIPTION**

Description of the job—The staff nurse is a professional who is responsible for administering individualized, direct and indirect, nursing care. She/He assists the Director of Nursing in her responsibility for total patient care within the nursing unit and for overall management of the unit. She/He performs all professional nursing duties and assumes the role of charge nurse on her.his unit.

Qualifications:

1. Must be a graduate of an accredited school of nursing.
2. Must have current licensure in this state as a registered nurse or as a licensed practical nurse.
3. Some prior acute-care, nursing experience is preferred.
4. Some prior geriatic nursing is preferred.
5. Good mental & physical health, sound judgment and high moral standards and a sincere desire to work with the aged and those with a limited capacity for selfcare.
6. Must have demonstrated ability to manage and supervise a nursing unit.
7. Must have ability to make independent decisions.

Duties:

1. Provides for comprehensive patient care and performs the scientific principals [sic] of nursing care in the administration of all treatments and procedures.
2. Gives & receives report.





3. Makes rounds to assure the safety & well being of all residents on her/his unit.
4. Evaluates patients needs, condition, and care and assists the assistant director of nursing in developing a nursing care plan for individual patients, including rehabilative & restorative activities, and instruction for self help.
5. Takes and transcribes physician's orders.
6. Checks patient's chart for specific treatment and medication orders. Checks patient's daily schedule. (Refer to job description for Nursing Assistant).
7. Makes rounds, takes and records vital signs as required. Checks and gives medications, gives treatments, and performs other professional services as ordered or required. These may include enemas, catherizations: lavaging, gavaging, suction; inhalation therapy if qualified; administration of I.V.'s if qualified; applying and changing dressings, bandages, packs, colostomy and drainage bags, etc.; massages and exercise; isolation set-up and care; care of dead and dying; others.
8. Gives emergency treatment when required, and notifies physician of emergency and takes and carries out physician's orders.
9. Accompanies physician on rounds and assists with examinations and treatments. Reviews patient care plan with physician. Notifies physician of automatic stop orders on specific medications. Notifies physician changes in patient's condition, and any unusual or abnormal observations.
10. Carries out restorative and rehabilitative program for patients. Instructs patients in self-help, self-care.

Instructs relatives in home care and rehabilitation. Carries out pre-discharge program for patients.

11. Attempts to fulfill spriitual [sic] and psychological needs of patients.
12. Assists Director of Nursing with supervision, orentation and instruction of other nursing personnel.
13. Assigns designated patient care activities to the nursing aides.
14. Gives direct assistance to nursing aids in completing patient care as needed.
15. Appraises the quality & quantity of nursing aids performance and keeps the DON and her assistant informed.
16. Keeps anecdotal notes to counsel or praise the nursing aides and shares these with the DON and her assistant.
17. Maintains unit records. Performs charting duties. Maintains narcotic records. Writes charges, updates care plans.
18. Schedules appointments and arranges for transportation of patients to other departments or facilities and clinics for diagnostic, therapeutic, dental or medical services.
19. Participates in and may conduct inservice training meetings.
20. Continues professional growth through current literature, inservice, and professional meetings.
21. Assists in establishing good public relations in dealing with the community and residents families.
22. Will perform duties on the unit assigned by the Director of Nursing as needed.



23. Will be available to work weekends as scheduled, working no more than 2 weekends in a row.
24. Will assume other responsibilities as may be directed by the Director of Nursing.

Health Care & Retirement Corporation **HCR**

# Employee Warning Notice

☐ Verbal Warning
☐ Written Warning
☐ Final Warning
☐ Termination

Name: | Date:

Position: | Department:

Reason for Notice:

☐ Absenteeism (show dates)
☐ Lateness (show dates)
☐ Misconduct (state circumstances)
☐ Work refusal (state circumstances)
☐ Violation of Policy (state policy)
☐ Violation of Department Rule (state rule)
☐ Other (state circumstances)

Comments and Explanation

f behavior of this nature continues, you will be subject to _____

Employee Comments

A copy of this notice will be placed in your personnel file. It is given to you with the hope that you will improve your conduct and performance.

Supervisor | Date

Employee's Signature | Date

Employee Refuses to Sign (Witness) | Date

Your signature means this incident has been discussed with you. It does not mean you agree with all comments.

STRIBUTION Employee, Personnel File

M Systems, Inc.
vised 3/88

REX #2 Pltf #7

Health Care & Retirement Corporation HCR

# Performance Appraisal

Employee's Name _____ Date Evaluation Due _____

Employee's Position _____ Today's Date _____

Department _____ Date Hired: _____

Reason for Evaluation:
☐ 30 Days ☐ 60 Days ☐ Annual ☐ Other: Specify _____

| | Excellent | Above Standard | Standard | Below Standard |
|---|---|---|---|---|
| 1. Punctuality | ☐ | ☐ | ☐ | ☐ |
| (1) Tardiness - Days Tardy _____ | | | | |
| (2) Attendance - Days Absent _____ | | | | |
| (3) Returns from breaks/lunch on time | | | | |
| (4) Arranges for lateness or time off in advance | | | | |
| (5) In-service Attendance | | | | |
| Needs improvement in: _____ | | | | |
| 2. Human Relations | ☐ | ☐ | ☐ | ☐ |
| (1) Cooperates with supervisors | | | | |
| (2) Is courteous and friendly | | | | |
| (3) Controls his emotions for the best interest of all | | | | |
| (4) Works well with other employees | | | | |
| Needs improvement in: _____ | | | | |
| 3. Attitudes Toward Work | ☐ | ☐ | ☐ | ☐ |
| (1) Looks for ways to improve | | | | |
| (2) Shows initiative | | | | |
| (3) Is enthusiastic about his work | | | | |
| (4) Accepts suggestions, instructions and constructive criticism | | | | |
| Needs improvement in: _____ | | | | |
| 4. Personal Appearance | ☐ | ☐ | ☐ | ☐ |
| (1) Appropriate dress for work | | | | |
| (2) Proper grooming | | | | |
| Needs improvement in: _____ | | | | |
| 5 Job Capability | ☐ | ☐ | ☐ | ☐ |
| (1) Budgets his time carefully | | | | |
| (2) Shows thoroughness in his work | | | | |
| (3) Understands that routine jobs are important | | | | |
| (4) Completes the job in a minimum amount of time | | | | |
| (5) Productivity | | | | |
| (6) Quality of Work | | | | |
| Needs improvement in: _____ | | | | |

Comments: _____

| | Excellent | Above Standard | Standard | Below Standard |
|---|---|---|---|---|
| 6. Development | ☐ | ☐ | ☐ | ☐ |
| (1) Has improved job performances | | | | |
| (2) Understands and adjusts to changes in job responsibility and procedures | | | | |
| Needs improvement in: _____ | | | | |
| 7. Patient Care (If applicable) | ☐ | ☐ | ☐ | ☐ |
| (1) Understands goals and objectives of patient care for individual residents | | | | |
| (2) Is courteous and understanding towards residents - both verbally and physically | | | | |
| (3) Works towards facility patient care goals | | | | |
| Needs improvement in: _____ | | | | |

OVERALL EVALUATION

Excellent ☐ Above Standard ☐ Standard ☐ Below Standard ☐

Recommend Continued Employment:

_____ No _____ Yes _____ With Reservations

Evaluator's Signature Date

Reviewed by Dept. Head Date

This report has been discussed with me.

Employee's Signature Today's Date

Reviewed by: _____
(Administrator)

Date: _____

IHM Systems, Inc.
Rev. 7/88

ORIGINAL: PERSONNEL FILE COPY: EMPLOYEE

R-X-B

# Supreme Court of the United States

No. 92-1964

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

ORDER ALLOWING CERTIORARI. Filed October 4, 1993.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 16, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 14, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, January 5, 1994. Rule 29 does not apply.

October 4, 1993

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No. 92-1964

# In the Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act (Act), 29 U.S.C. 152(11).

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# In the Supreme Court of the United States

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-11a, is reported at 987 F.2d 1256. The decision and order of the National Labor Relations Board and the decision of the administrative law judge, Pet. App. 12a-76a, are reported at 306 N.L.R.B. 63.

### JURISDICTION

The judgment of the court of appeals was entered on March 10, 1993. The petition for a writ of certiorari was filed on June 8, 1993, and granted on October 4, 1993, limited to the first question pre-

sented in the petition. J.A. 128. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act (Act), 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee * * * but shall not include * * * any individual employed as a supervisor * * *.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(12) of the Act, 29 U.S.C. 152(12), provides in relevant part:

> The term "professional employee" means—(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily



> acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes * * *.

## STATEMENT

1. Respondent owns and operates approximately 138 nursing homes in 27 States. This case involves the Heartland nursing home in Urbana, Ohio (Heartland). Heartland is a 100-bed facility. It is headed by an administrator, to whom several department heads report. One of these is the director of nursing (DON). Directly under the DON is the assistant director of nursing (ADON). Both the DON and the ADON are supervisors. Pet. App. 32a-35a.

The nursing department is staffed by approximately 65 personnel, including 9 to 11 staff nurses and 50 to 55 nurses' aides. Some of the staff nurses are registered nurses, while others are licensed practical nurses, but all have essentially the same duties. Pet. App. 34a-35a & n.5. Those duties include checking for changes in residents' health, administering medicine to residents, calling physicians when necessary, maintaining detailed records on treatment of residents, giving status reports to aides and to nurses on the next shift, handling incoming telephone calls from physicians and from relatives of residents who want information about a resident's condition, and, when an insufficient number of aides are working, bathing, feeding, or dressing residents. *Id.* at 36a. The nurses spend only "a small fraction of their time" exercising responsibilities regarding the aides.

*Id.* at 36a-37a. The aides, in turn, have the most contact with the residents; they bathe, dress, and feed them, and assist them with other aspects of routine care. *Id.* at 36a; J.A. 28, 52-54.

Heartland is divided into two wings. Pet. App. 34a. One staff nurse is always on duty in each wing, *id.* at 35a; the nurses work 12-hour shifts, from 7:00 a.m. to 7:00 p.m. or vice versa. *Id.* at 37a. The nurses' aides work eight-hour shifts beginning at 7:00 a.m., 3:00 p.m., and 11:00 p.m. There are six aides in each wing during the first shift, four in each wing during the second shift, and two in each wing (plus an aide who "float[s]" between wings) on the third shift. *Ibid.* The administrator, the DON, and the ADON work only during the day and on weekdays, *id.* at 46a, but the administrator and the DON are always on call, and nurses call them when non-routine matters arise. *Id.* at 47a; J.A. 4.

The duties of the aides off of the resident wings are assigned by Heartland's administrators. Pet. App. 39a. On the wings, the day-shift nurses tell each aide which residents are to be cared for by that aide. *Id.* at 38a. In making assignments, the nurses follow "old patterns" that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. *Id.* at 39a. The night-shift nurses arrive four hours after the evening-shift aides have begun work, and they do not change the aides' assignments. *Id.* at 38a; J.A. 4-5. After aides are assigned to patients, nurses have little role in directing the performance of their duties. Pet. App. 40a; J.A. 54. Each of the aides can do the work of any other aide. Pet. App. 38a; J.A. 27-28.

If one wing is understaffed due to the absence of one or more aides, the nurse on that wing may ask



the nurse on the other wing to transfer an aide. The aides are usually allowed to decide which of them will change wings. Pet. App. 37a-38a; J.A. 73. A nurse may also obtain a replacement aide by telephoning the aides until locating one who is willing to come in; the nurse has no authority to order an off-duty aide to report to work. Alternatively, the nurse may see if an aide wishes to remain on duty after the end of the aide's shift on overtime, but the nurse cannot insist that any aide do so. Pet. App. 41a; J.A. 6-8, 43-44. The nurses otherwise have no authority to grant overtime. Nor may the nurses allow an aide to be absent for personal reasons. Pet. App. 42a. Nurses initial time cards showing an aide's overtime or late arrival and routinely report problems, such as absences, to Heartland's administrator or DON. *Id.* at 42a, 44a.

In case of misconduct or poor job performance by an aide, a nurse fills out an "employee counseling form" and delivers it to the administrator or the DON. Pet. App. 43a-44a. Such forms remain in the aides' personnel files, but have never resulted in disciplinary action being taken against an aide. The nurses never discipline the aides or threaten to do so, and they seldom recommend that an aide be disciplined. *Id.* at 44a-45a; J.A. 10-15, 24, 28-29, 94.

Heartland gives each employee a performance appraisal after the employee's probationary period and annually thereafter. Initially, the nurses did not participate at all in the evaluation process. Begin- about one month before respondent's actions at issue here, however, the nurses began to fill out parts of the evaluation forms for some aides, rating the aides in several categories. The nurses were specifically told not to give any aide an overall rating or to make

a recommendation with respect to continued employment. The nurses deliver the forms to their superiors and do not participate in the separate meetings between each aide and the administrator or the DON, at which the evaluations are discussed. J.A. 21, 82-83, 88-89, 91-93. There is nothing to indicate that the nurses' role in the evaluation process has any impact on the aides' jobs. The aides' pay levels depend on seniority, and Heartland does not promote them. Pet. App. 43a, 45a-46a.

2. The Board's General Counsel issued a complaint alleging that respondent violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by issuing disciplinary warnings to several staff nurses, and later discharging three of them, for engaging in concerted activity designed to improve their working conditions and those of other employees.[1] Respondent contended that its actions with respect to the nurses were taken for legitimate reasons, and that, in any event, the nurses were "supervisors" under Section 2(11) of the Act,

[1] Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. 158(a)(1). Section 7 of the Act, 29 U.S.C. 157, grants employees the right, *inter alia*, to engage in "concerted activities for the purpose of * * * mutual aid or protection." The alleged unfair labor practices related to respondent's discipline of certain nurses and discharge of three of them after they requested a meeting with Heartland's administrator, and later met with one of respondent's officials, to discuss problems with respondent's "disparate enforcement of its absentee policy, short staffing, low wages for nurses aides, [respondent's] unreasonably switching its prescription business from one pharmacy to another, which increased the nurses' paper work, and management's failure to communicate with employees." Pet. App. 13a-14a.



29 U.S.C. 152(11), and were therefore not entitled to the protections of the Act. Pet. App. 33a.

a. The administrative law judge (ALJ) determined that Heartland's nurses are not "supervisors" within the meaning of Section 2(11) of the Act. Pet. App. 33a-49a. In so finding, the ALJ examined the nurses' functions in relation to the relevant activities considered supervisory under Section 2(11) and concluded that respondent "does not endow its nurses with the kind of authority" that would make them "supervisors for purposes of the Act," but instead treated them as "hired hands." Pet. App. 49a.

*Assignment.* The ALJ observed that the day-shift, but not the night-shift, nurses are involved in assigning the aides to care for residents. He found, however, that the nurses' responsibilities in that regard did not require the use of "independent judgment" as that phrase is used in Section 2(11). Pet. App. 38a-40a.

The ALJ also found that the nurses have no authority to require aides to work overtime or to request aides to work overtime because of the press of work. They can only offer overtime assignments to aides who are off duty (or scheduled to go off duty) in order to fill in for absent colleagues. Similarly, the nurses' authority to allow aides to leave early is limited to instances of sickness. Pet. App. 41a-43a.

*Direction.* The ALJ concluded that, "[o]nce the aides have their assignments, there is little for the nurses to do in the way of 'directing' them." Pet. App. 40a. While nurses may, for example, "issue orders related to any change in the condition of a resident," such as observing the resident closely or taking his temperature, the nurses' direction of the work of the aides does not amount to "responsibly

* * * direct[ing]" the aides "in the interest of the employer," since "the nurses' focus is on the well-being of the residents rather than of the employer." *Ibid.* "[T]he direction the nurses give to the aides," he added, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" *Ibid.*

*Reward, promotion, discipline, and evaluation.* The ALJ found that the nurses have no role in rewarding or promoting aides because the aides' pay level is not tied to performance, but "depends solely on their seniority," and because aides are not promoted. Pet. App. 43a. He also found that the nurses have no real role in disciplining or discharging aides because the nurses' criticism of aides' performance does not affect their job status. Although the nurses report problems about an aide's work to the administrator or the DON and may attend disciplinary conferences, the nurses do not themselves penalize, threaten to penalize, or (with minor exceptions) recommend penalties for the aides. *Id.* at 43a-45a.

*Other factors.* The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. Pet. App. 46a. He noted, however, that the administrator and the DON are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.* at 47a. The ALJ also examined the ratio of supervisors to employees (depending on whether the nurses are considered supervisors or not), but concluded that specific ratios are not dictated by the Act. *Id.* at 47a-48a.

"[A]nalyzing the situation at Heartland on the basis of the criteria that are spelled out in Section 2(11)," the ALJ concluded that "the nurses simply



do not possess supervisory authority."[2] Pet. App. 48a.

b. The Board affirmed the ALJ's determination that the nurses are employees, not statutory supervisors. Pet. App. 13a n.1. While clarifying that the ALJ had erred in his assumption, *id.* at 44a & n.7, that the General Counsel had the burden of proving that the nurses are not supervisors and reiterating that "[t]he party alleging supervisory status * * * bears the burden of proving an individual is a supervisor," the Board held that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees."[3] *Id.* at 13a n.1.

3. Respondent filed a petition for review, and the court of appeals vacated the Board's order. Pet. App. 1a-11a. With respect to the Board's test for determining whether nurses are supervisors, the court of appeals observed that "there is a history of conflict" between the Board's approach and decisions of the Sixth Circuit.

> The Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest. The Board maintains that nurses are working for the patient's interests, not the interests of their

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[2] The ALJ then found that respondent's issuance of certain disciplinary warnings violated the Act, but that respondent had not violated the Act by issuing other disciplinary warnings and by discharging three nurses. Pet. App. 49a-72a.

[3] The Board then found that respondent had violated the Act with respect to the disciplinary actions and discharges of the nurses at issue. Pet. App. 17a-27a; see note 1, *supra*. Those determinations of the Board are not at issue here.

> employers. Therefore, the Board maintains that nurses should not be considered to be supervisors under the Act.

*Id.* at 8a. The court noted, however, that in *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987), and *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548 (6th Cir. 1992), it had held that "if a nurse's actual functions performed met the statutory criteria for being a supervisor, then the nurse would not be disqualified because he/she was engaged in 'mere patient care.'" Pet. App. 8a. The court also noted that it has rejected the Board's view that the burden to establish that an individual is a supervisor rests on the party who asserts it, *id.* at 6a, 8a; instead, the court places the burden on the Board to establish "non-supervisory status." *Id.* at 10a.

Having rejected the Board's legal determinations, the court of appeals held that "the duties of a staff nurse at Heartland nursing home clearly require both assigning aides to specific tasks and directing the operation of the aides, as well as the entire nursing home, when the Director of Nursing or his/her assistant is not present." Pet. App. 10a. The court thus concluded that the staff nurses had the authority to "assign" and "responsibly direct" aides within the meaning of Section 2(11) of the Act. Pet. App. 9a-10a. Because of its finding that the nurses are statutory supervisors, the court of appeals vacated the Board's order without reaching the issue of whether respondent's discipline and discharge of the nurses was unlawfully motivated. *Id.* at 11a.



## SUMMARY OF ARGUMENT

The Board's rule in this case is that a nurse is not a "supervisor" within the meaning of Section 2 (11) of the Act when the nurse's direction of other employees is carried out in the exercise of professional judgment and is incidental to the treatment of patients. That rule is a reasonable interpretation of the statute and is entitled to judicial deference.

A. Congress excluded supervisors from the Act's protections in order to ensure that management could rely on the undivided loyalty of its representatives. The exclusion, however, was not designed to reach those with minor supervisory responsibilities who were in need of the protection of the Act and who did not exercise true management power. Accordingly, the language of the supervisory exception is limited to personnel who act "in the interest of the employer" with respect to the supervision at issue and who exercise authority that "is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. 152(11). The scope of the supervisory exception is further limited by the Act's coverage of professional employees, 29 U.S.C. 152(12), who generally supervise less-skilled personnel. The task of reconciling these statutory directives and implementing the policies of the Act with regard to supervisors belongs to the Board, whose rules must be upheld by the courts if they are "rational and consistent with the Act." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

B. The Board's experience in applying the Act in the health care field has led it to conclude that when a nurse's direction of less-skilled employees flows

from professional and patient-care interests, that direction does not constitute statutory supervision. In 1974, Congress amended the Act to cover private non-profit hospitals. Although proposals were made to exclude professional health care employees from the definition of supervisor, Congress concluded that this approach was unnecessary in light of the Board's rule that a health care professional's direction of other employees "in the exercise of professional judgment, * * * incidental [to] the professional's treatment of patients, * * * is not the exercise of supervisory authority in the interest of the employer." S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974). Since that time, the Board has adhered to the same principle, which, as this Court has noted, "Congress expressly approved in 1974." *NLRB* v. *Yeshiva University*, 444 U.S. 672, 690 n.30 (1980).

C. The Board's rule is rational and consistent with the Act. The conflict of loyalties that the supervisory exception is designed to avoid is not threatened when a nurse directs employees in reliance on professional norms rather than managerial policies promulgated by the employer. The distinction drawn by the Board between action "in the interest of the employer" and professional action in furtherance of patient care is thus responsive to Congress's dual concerns: to guarantee management the loyalty of its agents, while preserving the Act's protections for minor supervisory personnel. The rule is also consistent with the statutory scheme; indeed, the failure of the Board to limit the supervisory exception as applied to professionals would thwart Congress's purpose to afford coverage to them, because professionals normally oversee the work of at least some other per-



sons. This Court recognized that precise point in *Yeshiva*, in approving the general approach of the Board that is at issue here.

D. Applying the Board's test to this case, the nurses in question are not supervisors. The court of appeals suggested that the nurses engage in only two activities deemed supervisory under Section 2(11): assigning work to the aides and responsibly directing them. But the findings of the ALJ, upheld by the Board, establish that, to the extent that the nurses' actions were not purely routine, the nurses acted in the interest of patient care, in accordance with professional norms. Accordingly, the Board's finding that the nurses are protected employees should be upheld.

## ARGUMENT

### THE BOARD'S TEST FOR DETERMINING WHETHER A NURSE'S DIRECTION OF LESS-SKILLED EMPLOYEES MAKES THE NURSE A SUPERVISOR IS A REASONABLE INTERPRETATION OF THE ACT

#### A. The Determination Of Supervisory Status Under The Act Requires The Board To Balance Competing Interests

The original Wagner Act afforded organizational rights to "employee[s]" and provided no express exclusion for supervisors. Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450. Accordingly, the Board, with this Court's approval, permitted supervisory employees, such as foremen, to join labor organizations and required employers to bargain with those employees' representatives. *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). In 1947, however, Congress responded by amending the definition of employee in the Act to exclude supervisors. Labor Management

Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138 (codified at 29 U.S.C. 152(3)). The amendment's purpose was to ensure an employer the undivided loyalty of its representatives, who, if they were afforded a protected right to join or form unions, might be subject to control by the same union as the employees they were supposed to be supervising on the employer's behalf. H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 4-5 (1947).[4] The exemption was not designed to sweep in all employees who give some direction to others, however. The Senate Labor Committee observed that, "[i]n framing th[e] definition [of 'supervisor'] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory," S. Rep. No. 105, *supra*, at 19, and possess "genuine management prerogatives," *id.* at 4.[5]

[4] The same policy of avoiding conflicts of interest underlies the Act's implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974).

[5] Congress adopted the definition of "supervisor" in the Senate bill, which was more limited than that in the House bill. See *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 181-184 (1981). The Senate Committee explained that it was not "unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in the act." S. Rep. No. 105, *supra*, at 4. Accordingly, it "distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees * * * and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." *Ibid.* The definition of "supervisor" described in the Senate Committee Report was amended on the floor to include individuals who had authority "responsibly to direct" others, but that amendment was not intended to encompass the "minor" supervisory employees that the Senate Committee had meant to exclude from the definition of a supervisor. See 93 Cong. Rec. 4,677-4,678 (1947).



The language of Section 2(11), which defines the term "supervisor," reflects that congressional intention. 29 U.S.C. 152(11). "Supervisor" is defined to mean:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The scope of the supervisory exception is thus limited to personnel who act "in the interest of the employer" with respect to an activity listed in the statute *and* who exercise authority that is neither routine nor clerical, but demands the application of "independent judgment." The task of identifying what actions satisfy those limiting conditions is left to the expertise of the Board.

The supervisory exception is also limited by another aspect of the statute. The Act extends protection to professional employees, a catgory that, as defined in Section 2(12), 29 U.S.C. 152(12), covers employees who have duties requiring the "consistent exercise of discretion and judgment." Because most professionals have some supervisory authority to di-

rect another's work, the Board must distinguish between supervision in the statutory sense and work direction by a professional employee that is merely an exercise of the customary duties of that person's profession. Failure to draw such a distinction would negate Congress's intention to afford the protection of the Act to professional employees.

In light of the interplay of the Act's definitions and its policies with respect to the exclusion of supervisors from employee status, the Board's task is to develop rules that will avoid the conflicts of interest triggered by covering true supervisors, without denying the Act's protection to "employees with minor supervisory duties," S. Rep. No. 105, *supra*, at 4, or to professionals. Judicial review of the Board's rules is deferential, limited to assuring that they are "rational and consistent" with the statute. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). As this Court has noted, the Board has "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Engineers Beneficial Ass'n* v. *Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961).

### B. The Board's Longstanding Approach To Determining Supervisory Status In The Health Care Field Is The Product Of Experience And Has Been Endorsed By Congress

Because of the frequent interaction of professional employees with other types of employees in hospitals and nursing homes, the Board has accumulated a



large body of experience in determining supervisory status in the health care field.[6] The seminal decision is *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973). In that case, the Board found that a hospital's registered nurses were not supervisors although they directed other, less-skilled employees with respect to the work to be performed for patients and ensured that such work was done. The Board explained that the nurses' "daily on-the-job duties and authority in this regard are solely a product of their highly developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their [e]mployer." 183 N.L.R.B. at 951. The Board distinguished *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969), in which it had found the same hospital's floor nurses to be supervisors, "because, *in addition to* performing their professional duties and responsibilities, [the floor nurses] also possessed the authority to make effective recommendations which affected the job status and pay of the

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[6] The Board first asserted jurisdiction over private proprietary hospitals and nursing homes in 1967. *Butte Medical Properties*, 168 N.L.R.B. 266 (1967) (overruling *Flatbush General Hospital*, 126 N.L.R.B. 144 (1960)); *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967). The National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, extended the Board's jurisdiction to the employees of non-profit health care facilities. See *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544-1545 (1991). In the Board's rulemaking on appropriate bargaining units in acute-care hospitals, which this Court upheld in *American Hospital Ass'n, supra*, the Board determined that one appropriate bargaining unit would be a unit consisting of "[a]ll registered nurses." 29 C.F.R. 103.30(a)(1).

employees working on their wings." 183 N.L.R.B. at 951-952.[7]

In 1974, Congress "expressly approved" the Board's approach to determining supervisory status in the health-care field. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n.30 (1980). In enacting the National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, which brought private non-profit hospitals under the Act, both the Senate and House Committees rejected a proposal to exclude health care professionals from the definition of supervisor in Section 2(11).[8] After studying the proposal "with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians,"

[7] In earlier decisions, the Board had found that certain nurses who scheduled and assigned work did not do so in a manner requiring the exercise of independent judgment. *Diversified Health Services, Inc.*, 180 N.L.R.B. 461 (1969); *New Fern Restorium Co.*, 175 N.L.R.B. 871 (1969). That is also a basis for declining to deem nurses to be supervisors. See 29 U.S.C. 152(11) (excluding from the definition of supervisor a person whose "authority is * * * of a merely routine or clerical nature" and does not require "independent judgment").

[8] See *Extension of NLRA to Nonprofit Hospital Employees: Hearings Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 16-18 (1973) [*House Hearings*] (statement of Charles Hargett, R.N., American Nurses' Association); *id.* at 22-23 (remarks of Rep. Ashbrook); *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 112-113 (1973) [*Senate Hearings*] (statement of Bonnie P. Graczyk, R.N., American Nurses' Association).



the Committee reports explained that the proposed amendment was unnecessary in light "of existing Board decisions."

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same).[9] Each Committee added that it "expects the Board to continue evaluating the facts of each case in this manner when making its determinations." *Ibid.*

Since 1974, the Board's application of its rule regarding supervisory status has conformed to Congress' expectations. In determining the supervisory status of nurses, the Board has first inquired whether the authority that a nurse exercises over less-skilled employees is of a "routine nature," or requires the use of "independent judgment." If the authority is

[9] Congress was informed by an official of the Department of Labor, in the hearings leading to the 1974 amendments, that "in the proprietary hospitals and nursing homes the NLRB has * * * shown an ability to make necessary distinctions and to fashion workable rulings. For example, the Board has not generally deemed registered nurses to be supervisors, although they direct the work of nonprofessionals or less skilled people." *Senate Hearings, supra*, at 427 (statement of Richard S. Schubert, Undersecretary of Labor).

of a "routine nature," similar to the instruction given to other employees by a leadman in a factory, the Board finds that the authority is not sufficient to make a nurse a supervisor. See Pet. App. 39a-40a; *Waverly-Cedar Falls Health Care, Inc.*, 297 N.L.R.B. 390, 393 (1989), enforced, 933 F.2d 626 (8th Cir. 1991); *Beverly Enterprises, Alabama Inc.*, 304 N.L.R.B. 861, 863-864 (1991). When the nurse's authority involves the exercise of independent judgment, the Board draws a distinction between a nurse's direction of aides that is incidental to the delivery of patient care, on the one hand, and the possession of authority over personnel, such as the authority to affect the job status or pay of aides, on the other. Only in the latter case is the nurse found to be acting "in the interest of the employer" as that phrase is used in Section 2(11). *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390, 395 (1989), citing *Beverly Manor Convalescent Centers*, 275 N.L.R.B. 943, 947 (1985); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976). The Board has consistently followed that approach in determining the supervisory status of health care professionals, such as nurses.[10]

[10] See, e.g., *Wing Memorial Hospital Ass'n*, 217 N.L.R.B. 1015, 1016-1017 (1975) (registered nurse, who "controls" operating room, recovery room, and central supply room, is a statutory supervisor because she evaluates, schedules, and transfers employees, and makes effective recommendations about job applicants after interviewing them); *Presbyterian Medical Center*, 218 N.L.R.B. 1266, 1268 (1975) (registered nurses who serve as charge nurses and as team leaders are not statutory supervisors because "their duties are generally limited to giving directions in the performance of their professional duties"); *Meharry Medical College*, 219 N.L.R.B. 488, 490 (1975) (charge nurses perform routine direction not requiring use of independent judgment); *Newton-Wellesley Hospital*, 219 N.L.R.B. 699, 700 (1975) (test for determining whether a nurse is a supervisor is "whether that individual, who may give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients, also exercises supervisory authority in the interest of the employer"); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 192 (1976) (head nurses and their assistants were not statutory supervisors, since they "perform duties and functions predominantly in the 'exercise of professional judgment' incidental to their treatment of patients" and do not have "the authority to make effective recommendations with respect to the hiring, firing, transfer, or discipline of subordinates"); *Turtle Creek Convalescent Centres, Inc.*, 235 N.L.R.B. 400, 400 n.3. (1978) (applying standard approved in 1974 Senate Committee Report); *Misericordia Hospital Medical Center*, 246 N.L.R.B. 351, 352 (1979) (same), enforced, 623 F.2d 808 (2d Cir. 1980); *Mount Airy Foundation*, 253 N.L.R.B. 1003, 1008 (1981) (nurses "devote much of their time to direct patient care, and their direction of the staff nurses and nurse assistants is incidental to their treatment of patients. * * * [A]ssignments again are made in the exercise of their professional judgment with respect to the employees' abilities and the patients' needs"); *French Hospital Medical Center*, 254 N.L.R.B. 711, 713 (1981) (charge nurses' assignment of employees to teams is "a routine function," not indicative of supervisory status); *Read Memorial Hospital*, 265 N.L.R.B. 789, 791 (1982) ("While [the nurse] gave directions to other employees, those directions appear always to have been incidental to her treatment of patients * * *."); *Springfield Jewish Nursing Home for the Aged, Inc.*, 292 N.L.R.B. 1266, 1267 (1989) ("The routine assignment and direction of employees regarding patient care does not confer supervisory status on a charge nurse.").



As this Court has observed, "it may not always be realistic to infer approval of a judicial or administra-

tive interpretation from congressional silence alone. * * * But once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979) (citations omitted). See also *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982); *CBS, Inc.* v. *FCC*, 453 U.S. 367, 382-385 (1981); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). That principle applies with even greater force in this case, since, as this Court noted in *Yeshiva*, "Congress expressly approved in 1974" the Board's approach in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Yeshiva*, 444 U.S. at 690 n.30, citing S. Rep. No. 766, *supra*, at 6.[11]

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[11] Contrary to the suggestion of the court of appeals in *Beverly California Corp.* v. *NLRB*, *supra*, footnote 30 in *Yeshiva* does not endorse the view that a single committee report "could * * * alter the meaning of [the] statute." 970 F.2d at 1554 n.7. Rather, the footnote recognizes Congress's approval of the interpretation that the Board had previously given to the supervisor exception. That congressional recognition—noted in both the House and Senate committee reports accompanying a major extension of the Act and providing the explanation for Congress's rejection of a specific provision for health care professionals—is entitled to weight. See *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969) (committee reports represent "the considered and collective understanding of those Congressmen involved in drafting and studying [the] proposed legislation").



### C. The Board's Rule Is Rational And Consistent With The Statute

The Board's rule—that a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, does not make the nurse a supervisor within the meaning of Section 2(11) of the Act—is "rational and consistent with the Act"; accordingly, it is "entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. at 42.

1. The Board's test is a rational means of implementing Congress's intention that employees with "minor" authority over other employees not be denied the protections of the Act. As Congress recognized, the employer's interest in the undivided loyalty of its supervisory personnel does not justify the denial of organizational rights to all persons exercising some direction over others.[12] The line that the Board has drawn in the health care field is responsive to Congress's concerns.

Because of their expertise, nurses often play a pivotal role on the team of employees that delivers care to patients in a hospital or nursing home. Even when a nurse's responsibilities include the assignment or direction of the work of aides, the nurse's functions will seldom involve the formal exercise of managerial power that characterizes the position of supervisor. Rather, in assigning aides to specific patients, informing aides of the priorities in their work, and instructing aides in the proper methods of attending to patients, nurses are making essentially professional judgments. The nurses' professional training teaches them to take measures that will

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[12] See notes 4-5, *supra*, and accompanying text.

provide good patient care; in conveying instructions to others, they rely on those professional norms rather than on managerial policies formulated by the employer.[13] Such an exercise of authority in the interest of patient care does not align the nurses with management, and granting such nurses organizational

[13] As a representative of the American Nurses' Association explained to Congress, see *House Hearings, supra,* at 16-17:

> The health team providing the actual care to the patients within the unit may consist of several types of personnel—the nursing aide, the practical nurse and the registered nurse. The registered nurse, as the professional and the most educated of this group, provides the direction for the care of the patient. In this sense, the senior nurse or head nurse or the nurse "in charge" of the nursing care unit or of a group of patients, functions as a patient care coordinator, determining the patient's needs, determining who among the staff shall care for the patient, and providing the advice and consultation needed by less prepared or less experienced team members. The nurse utilizes professional judgment in providing direct care to patients and in evaluating whether good and adequate patient care is being given by others, whether medical directives are being carried out appropriately and whether records are adequately maintained within the unit so that continuity of patient care can go on despite the shifts in personnel.
>
> Almost all nurses exercise independent judgment and *professional authority* to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses. In present-day hospitals, such true supervisors are typically limited to the director of nursing and her immediate assistants and associates.



rights does not threaten the conflicting loyalties that the supervisor exclusion was designed to avoid.

That is not to say that the nurses are acting *contrary* to the interest of the employer, as the court of appeals seemed to assume that the Board's rule implied. *Beverly California Corp.* v. *NLRB*, 970 F.2d at 1553; *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1079; see Pet. App. 8a-9a (relying on those cases). The Board's test does not suggest that the employer's business interest and the nurse's interest in providing good patient care are mutually exclusive. Of course, "there is naturally a coincidence of interests so that by catering to patient needs and providing necessary care, the employer's broader interests are also advanced. Obviously, even rank and file employees, and not only supervisors, are employed to work for the advancement of an employer's interests." *Beverly Manor Convalescent Centers*, 275 N.L.R.B. at 946-947. See *United Brewery Workers* v. *NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961) ("The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew."), cert. denied, 369 U.S. 843 (1962).

If it is to have significance, however, the statutory requirement that supervisory authority be exercised "in the interest of the employer," 29 U.S.C. 152(11), must mean more than acting in a way that furthers the employer's business interests. The Board's rule gives that requirement substance by considering whether the authority at issue implements management's business norms or the employee's professional norms. When nurses wield control over such assignment issues as who works what shift, effectively recommend or impose discipline, or effectively recom-

mend or grant promotions or wage increases, the need for the employer to have the undivided loyalty of its agents is present, and the Board has accordingly found the nurses to be supervisors. See, *e.g.*, *Sherewood Enterprises, Inc.*, 175 N.L.R.B. at 354-355; *Trustees of Noble Hospital*, 218 N.L.R.B. 1441, 1442 (1975). But "no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the [employer's] profit-maximizing objectives." *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). Accordingly, the Board's rule rationally implements the policy of the statute. Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 190 (1981) (upholding, as a "reasonable" rule, the Board's determination to exclude from bargaining units those confidential employees who assist managers that have labor-relations authority, but not to exclude confidential employees who have no "labor nexus").

2. The Board's rule is also consistent with the statute. The court of appeals apparently believed that the Board's rule violates a literal reading of the words "assign" and "responsibly to direct" other employees "in the interest of the employer" in Section 2(11), 29 U.S.C. 152(11). See Pet. App. 7a-8a. The statutory criterion of having authority "in the interest of the employer," however, must not be read so broadly that it overrides Congress's intention to accord the protections of the Act to professional employees. 29 U.S.C. 152(12).

The definition of "professional employee" covers "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants." H.R. Rep. No. 510, 80th Cong.,



1st Sess. 36 (1947). If all it took to be a statutory supervisor were a showing that an employee gives discretionary direction to an aide, even though done pursuant to the customary norms of the profession, the coverage of professionals would be a virtual nullity. As one court has explained, "[s]upervision in the elementary sense of directing another's work is excluded [from Section 2(11)]; a supervisor under the statute must have authority over another's job tenure and other conditions of employment. This distinction is important because the Act allows professionals—doctors, teachers, etc.—to bargain collectively * * * yet most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on." *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983).[14]

[14] The particular employees involved in this case are licensed practical nurses. Pet. App. 12a-13a. Unlike registered nurses, who are professional employees, licensed practical nurses are considered "technical" employees. The Board, however, applies the same test of supervisory status to licensed practical nurses as it does to registered nurses where, as here, they have the same duties as registered nurses. See, *e.g.*, *Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323, 324 (1973) (registered and licensed practical nurses not supervisors where work assignments and directions they give to aides and orderlies "are either in accord with the scheduling done by the director of nursing or dictated by the needs of the patients," and they "do not have any authority to affect, either directly or by making effective recommendations, the employment status" of those working under their direction); *Ohio Masonic Home, Inc.*, 295 N.L.R.B. 390 & n.1, 394-395 (1989); *id.* at 396; cf. *NLRB* v. *Res-Care, Inc.*, 705 F.2d at 1466 (licensed practical nurses "are, if not full-fledged professionals, at least sub-professionals").

This Court has previously concluded that the Board's general approach to determining the supervisory status of professionals, in the health care field as in other fields, properly harmonizes the Act's protection of professionals with the employer's prerogative to have a cadre of agents with undivided loyalty to it. In *NLRB* v. *Yeshiva University, supra,* the Court, while concluding that certain university professors were excluded from the Act as managers (see note 4, *supra*), stated:

> We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.

444 U.S. at 690 (footnote omitted). In a footnote, the Court referred to the Board's application of those principles in a variety of contexts, including cases in the health care field, *id.* at 690 n.30,[15] and concluded

[15] In footnote 30, the Court cited Board decisions and stated that "architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. * * * See also *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enf'd, 489 F.2d 772 (CA9 1973) (nurses) * * *." *Yeshiva*, 444 U.S. at 690 n.30. The Court specifically noted that in 1974 Congress "expressly approved" the Board's test in the "health-care context." *Ibid.* See note 11, *supra*, and accompanying text.



that those "decisions accurately capture the intent of Congress." *Id.* at 690. This Court's view in *Yeshiva* that the Board's approach "accurately capture[d]" Congress's intent confirms the consistency of the Board's rule with the statutory scheme.

The rule that the Court rejected in *Yeshiva* is quite different from the rule at issue in this case. In *Yeshiva*, the Board argued that Yeshiva University's faculty were not managerial employees, because, although the faculty participated in academic governance, the University anticipated that they would do so exercising "independent professional judgment," and did not expect them to conform to management policies or judge them for effectiveness in doing so. *Yeshiva*, 444 U.S. at 684. The Court rejected that broad argument, which it said "could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities." *Id.* at 687. Instead, it found the "controlling consideration" on the facts of that case to be that the "faculty of Yeshiva University exercises authority which in any other context unquestionably would be managerial"; using the "industrial analogy," the Court stated that "the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.* at 686.

In this case, the nurses' authority to assign or direct the work of aides would not unquestionably be supervisory in any other context. To the contrary,

the ALJ, upheld by the Board, found that "the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses," Pet. App. 40a, and that "the actions of Heartland's administrator proclaimed in unmistakable fashion that, to [respondent's] management, Heartland's nurses were just hired hands." *Id.* at 49a. A nurse's direction of aides, in the exercise of professional judgment incidental to the treatment of patients, is analogous to the university professors' authority to "determine the content of their own courses, evaluate their own students, and supervise their own research"—customary professional responsibilities which the Court, in *Yeshiva*, stated would not be sufficient to exclude professors from the protections of the Act. 444 U.S. at 691 n.31.

The Board's rule does not afford the protections of the Act to individuals merely because of their professional status, even though they may have been vested with true supervisory or managerial authority, as the Court found was the case with the university faculty in *Yeshiva*. When a nurse is vested with such authority, the Board will find the nurse to be a supervisor. But when the direction of aides or assignment of their tasks is simply an extension of the professional duties that the nurse is trained to perform, the Board is not required by the statute to deny to the nurse the protections of the Act. Indeed, to do so would undermine Congress's express purpose for amending the Act in 1974: to afford nurses and other health care workers the right to improve their conditions of employment through organization and collective bargaining. See *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 497 (1978) ("The elimination of the nonprofit hospital exemption reflected Con-



gress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees.").[16]

### D. The Nurses In This Case Do Not Possess Supervisory Authority Under The Board's Test

Under the Board's approach, the nurses in this case are protected employees, not statutory supervisors.[17] The ALJ found that, apart from having occasionally to switch an aide from one wing to another, the night-shift nurses had no role in assigning work to aides. When the nurses on that shift come

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[16] In its recent rulemaking on appropriate bargaining units in acute-care hospitals, see note 6, *supra*, the Board noted the difficult employment conditions that nurses face. See *Collective-Bargaining Units in the Health Care Industry; Second Notice of Proposed Rulemaking*, 53 Fed. Reg. 33,900, 33,912-33,913 (1988) (low salaries of registered nurses employed in hospitals); *id.* at 33,916 (severe shortage of registered nurses creating stress on the job); *id.* at 33,928 (nurses employed in nursing homes generally receive lower salaries than their counterparts in acute-care hospitals).

[17] The Board has determined that the burden of proof on the issue of supervisory status falls on the party alleging the existence of such status. See Pet. 19-22. Although the court of appeals has rejected that position and has held that "[t]he Board always has the burden of coming forward with evidence showing that the employees are not supervisors," *NLRB* v. *Beacon Light Christian Nursing Home*, 825 F.2d at 1080, that issue is not dispositive here, because the Board found that, in any event, "the preponderance of the evidence [in this case] establishes that the nurses are employees." Pet. App. 13a n.1. Other courts of appeals have upheld the Board's position on the burden of proof issue. See, *e.g.*, *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992).

on duty the four aides already there have previously been given their assignments by the day-shift nurses. Pet. App. 38a. He further found that, while the day-shift nurses "have the authority to vary the aides' assignments in ways that can make a difference to the aides, and they are expected to exercise judgment in exercising that authority," the nurses follow "old patterns" that have evolved over time, and generally allow aides to continue working with the same residents if the aides so desire. *Id.* at 39a. The "nature of the aides' work is not highly technical," and "[e]very aide is able to do the work of every other aide." *Id.* at 38a-39a. Accordingly, the ALJ found that "the aide assignment duties of the nurses seem to me to fall well short of 'requir[ing] the use of independent judgment,' as that expression is used in Section 2(11)." *Id.* at 40a.

The ALJ also found that the nurses' direction of the aides did not qualify as statutory supervision. The nurses have authority to criticize an aide for improperly performing a task, to tell an aide to redo a task inadequately done, to direct an aide to do chores not covered by the assignment sheet, to issue orders related to any change in the condition of the resident, and to tell aides when to take their work breaks (although, in practice, the aides usually work that out among themselves). Pet. App. 40a. The ALJ concluded, however, that this does not equate to "responsibly * * * direct[ing]" the aides "in the interest of the employer" because "the nurses' focus is on the well-being of the residents rather than of the employer." *Ibid.* The ALJ added that "the direction the nurses give to the aides is closely akin to the kind of directing done by leadmen or straw bosses,



persons who Congress plainly considered to be 'employees.' " *Ibid.*

The court of appeals did not reject any of the ALJ's underlying factual findings. Rather, the crux of the court's decision is its rejection of the Board's established rule that a nurse's assignment and direction of the work of less-skilled aides, in the exercise of professional judgment and incidental to the nurses' treatment of patients, does not transform the nurses into supervisors under the Act. Pet. App. 8a-10a. The court of appeals acknowledged that aide assignments are "based primarily upon the needs of the patients," *id.* at 9a-10a, because "[c]ertain patients may require more aides based on the patients' physical and mental infirmities," *id.* at 10a n.2. But based on its disagreement with the Board's rule, the court summarily found that the nurses are supervisors because "[a]mong a staff nurse's functions are the authority to assign the nurses aides and to responsibly direct them." *Id.* at 9a.

The court of appeals did not dispute that any assignment and direction in this case, to the extent it was not purely routine, was done by the nurses as an incidental aspect of patient care, in accordance with professional standards. If the nurses in this case are deemed to be supervisors based on the slight showing of authority over aides relied upon by the court of appeals, it would remove a major group of employees from the Act's protection with little or no advancement of the purpose of the supervisory exception. The Board's test prevents such misapplications of the statute. Because the court of appeals erred in rejecting the Board's rule, and because there is no other basis in the record for finding respondent's

nurses to be supervisors, the Board's conclusion that the nurses are protected by the Act should be upheld.[18]

[18] Respondent suggests that, in the alternative, the nurses could be found to be supervisors under another branch of Section 2(11) because they "play a crucial role in the disciplinary and evaluative processes in the facility." Br. in Opp. 5. As we explained at the certiorari stage, see Pet. Reply Br. 1-5, that contention lacks merit; the extensive findings of the ALJ establish that the nurses did not discipline or evaluate the aides. Respondent also errs in stating that the ALJ "ignore[d]" the nurses' job description or the ratio of employees to supervisors in the nursing department if the nurses are not supervisors. Br. in Opp. 5 n.4; see also *id.* at 9 n.9. The ALJ properly went beyond the nurses' job description and determined that, in fact, the authority that the nurses had over the aides was not sufficient to meet the Section 2(11) criteria for supervisory status. Pet. App. 37a-46a. And the ALJ noted that specific ratios are not dictated by the Act and cannot overcome other evidence that is inconsistent with supervisory status. *Id.* at 48a. The ALJ acknowledged that the nurses are the "senior personnel present" during weekends and the evening and night shifts. *Id.* at 46a. He noted, however, that the administrator and the director of nursing are always on call and are in fact often called when the nurses have to deal with a non-routine matter. *Id.* at 47a.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 92-1964

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
HEALTH CARE AND RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED

Whether the court of appeals correctly determined that licensed practical nurses who have authority to "assign" and "responsibly to direct" subordinate employees in a nursing home are acting "in the interest of the employer" and are therefore "supervisors" within the meaning of Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).*

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* The Rule 29.1 statement filed by respondent in its brief in opposition to the petition for certiorari remains current.

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## BRIEF FOR THE RESPONDENT

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### STATUTORY PROVISIONS INVOLVED

The relevant statutes are set forth in the brief of petitioner.

### STATEMENT OF THE CASE

On May 25, 1989, the National Labor Relations Board ("Board") issued a complaint alleging that respondent, Health Care and Retirement Corporation of America ("HCR"), committed unfair labor practices under Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 151, *et seq.* ("NLRA" or "Act"). The complaint charged that respondent improperly disciplined four licensed practical nurses employed at one of its nursing homes for engaging in concerted activity. Pet. App. 2a. Respondent has maintained from the outset that the discipline was imposed for legitimate reasons unrelated to any activity arguably protected by the Act. *Id.* There is no dispute, however, that the NLRA would not prohibit

respondent from disciplining these nurses for the conduct alleged if they were "supervisors," as defined by the Act. 29 U.S.C. 152(11). The record evidence, and the court of appeals' decision, fully support dismissal of the General Counsel's complaint on this ground.

### A. Record Evidence Concerning the Supervisory Activities of Licensed Practical Nurses Employed by Respondent

The licensed practical nurses who were allegedly disciplined in violation of the Act were employed at Heartland of Urbana ("Heartland").[1] Heartland is a 100 bed, long-term care nursing facility owned and operated by HCR in Urbana, Ohio. The facility provides skilled nursing care to its residents who are elderly, infirm, and need assistance with their daily living activities. Pet. App. 34a-35a. Evidence concerning HCR's organizational structure, as well as the responsibilities assigned to the nurses, readily demonstrates that HCR relies upon its licensed practical nurses to supervise the nurse aides ("aides") who are employed at the facility.

1. As the ALJ acknowledged, HCR's organizational structure suggests that the staff nurses are supervisors. Pet. App. 46a-47a. The Director of Nursing ("DON") has overall responsibility for the nursing department.[2] There is an Assistant Director of Nursing ("ADON"), a treatment nurse, and a patient assessment nurse. Pet. App. 34a-35a. The balance of the staff fluctuates from 9 to 11 registered and licensed practical "staff" nurses and approximately 50-55 nurse aides. *Id.* at 35a.

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[1] Petitioner concedes (Pet. Br. at 27 n.14) that these nurses are not professional employees. The Board has consistently held that licensed practical nurses are not professional employees under Section 2(12). National Labor Relations Board, *Thirty-Eighth Annual Report* at 66-67 (1973).

[2] The DON, like all other department heads, reports directly to the Administrator, who is the senior management official at the facility. Pet. App. 34a.



Heartland is divided into two wings, and each wing has approximately 50 beds and one nurses' station. The facility operates 24 hours per day in three shifts. On the day shift, each wing is staffed with one staff nurse and six aides. Pet. App. 37a; Jt. App. 62-63. The DON and ADON also work days during the week.[3] On the evening shift, each wing has one staff nurse and four aides. *Id.* On the night shift, there is one staff nurse on each wing, with five aides working both wings. Pet. App. 37a; Jt. App. 63. Neither the DON nor the ADON are regularly at the facility after 5:00 p.m. and neither one regularly works on weekends. Pet. App. 46a; Jt. App. 4. Thus, the staff nurses are the most senior ranking employees at the facility after 5:00 during the week, and at all times on the weekends—approximately 75% of the time. Pet. App. 46a-47a.

Aides are non-licensed personnel who provide basic care to the residents. Pet. App. 36a; Jt. App. 61. The aides' work is not technical. It includes lifting, turning and helping to mobilize the residents. It also includes assisting the residents with daily necessities such as eating, bathing, dressing and grooming. *Id.*; Jt. App. 35, 54, 61. The aides report directly to the staff nurse on duty. Pet. App. 38a; Jt. App. 61. If the staff nurses are not supervisors, the DON is the sole supervisor for some 60-70 nursing department employees.[4] As the Administrative Law Judge noted, it is not reasonable to infer that

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[3] The DON and the ADON usually work from 7:00 a.m. to 4:00 or 4:30 p.m., Monday through Friday. Pet. App. 46a. The staff nurses work twelve hour shifts beginning at either 7:00 a.m. or 7:00 p.m. *Id.* at 37a. Aides work eight hour shifts beginning at 7:00 a.m., 3:00 p.m. or 11:00 p.m. *Id.* In June of 1989, staff nurses began working three shifts per day, rather than just two. Jt. App. 63. The ALJ considered the nurses' status, however, during the period of January through mid-March of 1989. Pet. App. 34a, 37a.

[4] The ADON is a supervisor, but does not actively supervise aides. Neither the aides nor the nurses considered the ADON to be *their* supervisor. Jt. App. 52; Transcript of hearing before the ALJ ("Tr.") at 42, 154.

respondent would structure its operations with a 30:1 ratio of employees to supervisors. Pet. App. 47a-48a.

2. The duties conferred on the staff nurses are also indicative of supervisory status. The staff nurses perform a variety of functions, because, as the ALJ stated, "by and large it is the responsibility of Heartland's nurses to ensure that the needs of the residents are met." Pet. App. 36a. Respondent trains the staff nurses to supervise the aides, and gives the staff nurses the authority and responsibility to manage operations and direct the aides assigned to their wing.[5]

a. HCR's job description, training program, and compensation levels are all indicative of the staff nurses' supervisory status. The job description provides that staff nurses are responsible for the overall management and supervision of their units. Resp. Ex. 1; Jt. App. 122-25. Staff nurses must possess a "demonstrated ability to manage and supervise a nursing unit" and the "ability to make independent decisions." *Id.*[6] To assist them in performing their supervisory duties, HCR provides mandatory supervisory training for staff nurses. Staff nurses are trained to oversee the work of aides, to evaluate the aides' performance, and to communicate effectively with them. Jt. App. 109-10, 113-15. Aides do not receive this training. The licensed practical nurses are also compensated at the benefit tier reserved for supervisors, department heads, and other professionals. Tr. 1599.

b. The Administrative Law Judge acknowledged that the staff nurses have "authority over" and "responsibili-

[5] In addition to supervising the aides, staff nurses have responsibility for dealing with physicians and families. Resp. Ex. 1; Jt. App. 122-25.

[6] The description states that staff nurses are required to assist the DON with supervision; participate in the orientation and instruction of nurses' aides; assign designated patient care activities to the aides; appraise the aides' performance and keep notes for this purpose; and share the notes with the DON. *Id.* Each LPN is given a copy of the job description. Resp. Exs. 8, 13, 15, 19.



ties regarding" the aides. Pet. App. 37a. The scope of that authority includes responsibility to ensure adequate staffing; to make daily work assignments; to monitor the aides' work to ensure proper performance; to counsel and discipline aides; to resolve aides' problems and grievances; to evaluate aides' performance; and to report to management.

*Ensuring Adequate Staffing.* As the ALJ noted, when aides do not report to work, the staff nurse on duty must find replacements. Pet. App. 41a; Jt. App. 7, 106. The staff nurse may fill the vacancies by calling off-duty aides or asking aides to work an extra shift and approving overtime pay for that purpose. Pet. App. 41a-42a; Jt. App. 7, 69-70, 106. When staffing is short, staff nurses often reassign aides from one wing to the other so that each wing has a sufficient work force. Pet. App. 37a; Jt. App. 84-85. Staff nurses also approve requests for a temporary change in work days, or "shift swaps." Jt. App. 55-56, 73-74. Further, staff nurses are responsible for approving aides' requests to leave work early (Tr. 1054, 1190, 1275), and must assign or approve the aides' break and lunch periods. Pet. App. 40a; Jt. App. 36-37.

*Assigning Work to Aides.* Although the DON assigns the aides to a particular shift, the staff nurses direct the aides' day-to-day assignments, and "tell each aide which residents the aide is to care for." Pet. App. 38a; Jt. App. 5, 65. Aides are not assigned to the same residents every day. Any change in the number of residents, their needs, or the availability of the aides for work requires the staff nurse to adjust the assignments by reassigning aides to different residents or job duties. Jt. App. 30-31, 99-100.[7] The nurses' goal in making job assignments is to be fair to the aides and to ensure that residents receive proper care. Jt. App. 85-87. The fair distribution of

[7] The residents' needs are influenced by factors such as the residents' weight, continence level, ability to ambulate, ability to control movements, ability to feed themselves, and their general medical condition. Pet. App. 38a, 36a.

work affects the aides' working conditions and morale. Jt. App. 30-31. The ALJ accordingly observed that staff nurses "have the authority to vary the aides' assignments in ways that can make a difference to the aides"; that they are "expected to exercise judgment in exercising that authority"; and that "the way nurses divide up the work among the aides (on the daytime or evening shifts) can have a considerable impact on how hard each of the aides has to work." Pet. App. 39a.[8]

*Monitoring Work and Discipline.* The staff nurses have the authority and responsibility to monitor the quality of the aides' work. The ALJ observed that, "[i]t is clear that the nurses have the authority to criticize an aide for improperly performing a task [and] to tell an aide to redo a task inadequately done." *Id.* at 40a. Moreover, the ALJ agreed that "every Heartland nurse routinely speaks to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly." *Id.* at 43a. When performance problems arise, the staff nurse may choose to use a counseling form. *Id.* at 43a-44a. The ALJ noted that such forms have been used to report and to correct a wide range of performance problems. *Id.* (citing forms describing an aide as being " 'too bossy,' improperly passing work off onto other aides, not working fast enough, and 'not positioning patients properly.' ") Staff nurses also have authority to issue disciplinary warnings.[9] Jt. App. 75-77. If the infraction is minor, the nurse may choose simply to talk to the aide about it, or provide a verbal warning. Jt. App. 10-11, 29, 45-47; Tr. 103, 188, 1187. For more serious infrac-

[8] The day shift staff nurses spend considerable time preparing the aides' job assignments. The assignments sometimes take 2-3 hours to complete. Jt. App. 85. Some nurses work on the job assignment sheets at home. Jt. App. 35; Tr. 978.

[9] Staff nurses are also authorized to terminate aides for abusing residents, subject to review by the DON or Administrator. Tr. 1294-95.



tions, the staff nurse has authority to issue a written warning.[10]

*Addressing Aides' Grievances and Complaints.* Staff nurses have the authority and the responsibility to address the aides' grievances and complaints. Tr. 410.[11] If the staff nurse does not successfully resolve the grievance by informally discussing it with the aide and other employees, it is reported to the DON. Tr. 81, 410, 419, 1265-66. The DON confers with the staff nurse and makes an assessment. In most cases, the DON refers the matter back to the staff nurse to implement the resolution. Tr. 244, 433.[12]

[10] Formal written warnings are used to discipline an aide for such things as absenteeism, lateness, misconduct, or work refusal. Jt. App. 76-77; Resp. Exs. 2, 23. For example, a staff nurse counseled and issued a warning to an aide for being abrupt with a resident (Resp. Ex. 23). A less formal counseling form is often used when the infraction is not considered serious. Jt. App. 76-77, 93-94; Tr. 1198; G.C. Ex. 5, 39; Resp. Ex. 18, 23. For example, staff nurse Wells corrected an employee for not properly turning residents over and not doing her share of the workload. Resp. Ex. 18; Tr. 1208-09. Wells explained to the aide that she needed to do her job with more accuracy and speed. *Id.* The aide responded in writing on the counseling form, acknowledging Wells' warning that additional write-ups could lead to termination. Resp. Ex. 18.

[11] Staff nurse Clore testified that on more than one occasion she had to deal with conflicts among the aides. Jt. App. 108. When several aides complained that another aide on duty had an offensive body odor, Clore spoke with the aide and resolved the problem. Jt. App. 108-109. Clore resolved some disputes by calling an impromptu meeting and advising the aides that "this is the way things are going to be done." Jt. App. 109.

[12] For example, a number of aides complained to the DON that an aide, Stanhope, was not doing her work properly, was not doing her share of the work, and was directing the work of other aides. Jt. App. 58; G.C. Ex. 4. The DON referred the matter to the staff nurse in charge of that wing. The staff nurse spoke with Stanhope about the problem (Jt. App. 58), and followed up with a written statement of the incident. G.C. Ex. 4.

*Job Evaluations.* The staff nurses evaluate the aides' performance at the end of the aides' ninety day probationary period and annually. The evaluations are in writing, and are used to determine whether the aide should be retained as an employee. Pet. App. 45a; Jt. App. 127.[13] The annual performance appraisal form calls for evaluating the aides in the areas of human relations, attitude toward work, punctuality, personal appearance, job capability, development, and patient care. Resp. Ex. 3; Jt. App. 77-78, 127. The staff nurses fill out and sign the annual evaluation form. Pet. App. 45a.[14] The staff nurses take their performance appraisal role seriously, recognizing the importance of providing constructive feedback to aides. Tr. 196-97; Jt. App. 39-44. The aides review, comment on, and sign the performance appraisals. Jt. App. 78, 92-93. The evaluations are then reviewed and signed by the DON, and are kept in the aides' permanent personnel file. Tr. 912.[15]

*Reports to Management.* The staff nurses regularly report their activities to management. The ALJ in fact observed that "[n]urses routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N." Pet. App. 44a. Moreover, the ALJ acknowledged that "[s]ometimes those reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in dis-

[13] *See* G.C. Exs. 8, 9; Resp. Exs. 23, 4, 10, 11; Jt. App. 19, 89-40.

[14] The staff nurses do not complete the form for punctuality and personal appearance. Resp. Ex. 3; Tr. 1016. Attendance is evaluated based on payroll records maintained in the business office. Jt. App. 39-40, 91-92. Some staff nurses do not complete the section entitled "Overall Evaluation," but some nurses do complete it. Jt. App. 40.

[15] Because aides cannot be promoted to a staff nurse position without first having satisfied the educational requirements to be an RN or an LPN, performance appraisals are not used for promotion. Resp. Ex. 12; Tr. 438, 1302. Pay increases are generally based on seniority (G.C. Ex. 10B; Tr. 915), but on at least one occasion, a staff nurse was not given an annual pay increase because of a poor performance evaluation. Tr. 916.



charge," and that "sometimes the nurse sits in on the conference between the administrator or D.O.N. and the aide [when] the aide is advised of that action." *Id.*

**B. The Decision of the Administrative Law Judge**

The ALJ resolved the threshold issue of the nurses' supervisory status against HCR. The ALJ nevertheless determined that HCR had not committed an unfair labor practice by discharging the nurses, and that, with one exception, HCR also had legitimate reasons for issuing written warnings to the nurses. Pet. App. 63a, 64a.

1. With respect to the supervisory issue, the ALJ found that "[i]t is clear that in common parlance Heartland's nurses are 'supervisors' " because "[t]hey give orders (of certain kinds) to the aides, . . . the aides follow those orders," and "the nurse on duty is in charge of the wing of the facility" "[i]n a manner of speaking." Pet. App. 48a. The ALJ nevertheless concluded that "Section 2(11)'s definition of supervisors is different from Webster's," and that "as I understand the meaning of that provision, Heartland's nurses were not supervisors." *Id.*

The ALJ recognized that the various duties characterized as supervisory in Section 2(11) of the Act, 29 U.S.C. 152(11), must be read "in the disjunctive." Pet. App. 34a (*quoting Phelps Community Medical Center*, 295 NLRB No. 55 (June 15, 1989)). The ALJ accordingly acknowledged that if the nurses had authority to engage in any one of the 12 supervisory activities enumerated in the statute, they could not claim protection of the Act if the other statutory requirements were satisfied.

The ALJ acknowledged that the staff nurses have wide ranging duties and extensive authority. He nevertheless concluded that the staff nurses' responsibilities did not constitute statutory supervision either because they were not performed "in the interest of the employer" (*id.* at 40a); were exercised in a "routine" fashion; or were exercised in a manner that did not affect the job status of the aides. *Id.* at 44a, 45a, 46a, 49a.

First, the ALJ concluded that the staff nurses did not have authority to "assign" work to the aides in a manner that required the "use of independent judgment" within the meaning of Section 2(11). The ALJ reached this legal conclusion even though he also found that staff nurses have authority to reassign aides from one wing to another; to assign aides to specific patients; to call in off-duty aides when replacements are necessary; to approve overtime; "to vary the aides' assignments in ways that can make a difference to the aides"; and are "expected to exercise judgment in exercising that authority." Pet. App. at 39a.[16]

The ALJ also determined that the staff nurses did not have authority "responsibly to direct" the aides in the interest of HCR. The record, and the ALJ's opinion, is replete with evidence that the staff nurses were charged with the responsibility to exercise judgment and discretion in directing aides' work. The ALJ noted, *inter alia*, that the nurses "oversee the work of the aides" (Pet. App. 36a); "criticize an aide for improperly performing a task" (*id.* at 40a); "routinely speak[] to an aide whenever the nurse sees the aide failing to perform a task or performing it improperly" (*id.* at 43a); "routinely report problems about an aide's work or attendance to Heartland's administrator or D.O.N." (*id.* at 44a); sit in on disciplinary conferences with the aides (*id.*); "determine when the aides may take their work breaks" (*id.* at 40a); are the "senior personnel" at the facility during the evening and at night on week days, and on weekends (*id.* at 46a-47a); that the aides "follow [the nurses'] orders" (*id.* at 48a); and that the nurses are "in charge of a wing of the facility." *Id.* Despite this evidence, the ALJ concluded: "[t]hat does not equate to

[16] Because some of the nurses "followed old patterns" when making assignments, or permitted aides to choose assignments, the ALJ concluded that the job of assigning work to the aides did "not demand great skill and finesse of the nurses," and thus did not require the use of independent judgment. *Id.* at 38a, 40a.



'responsibly . . . direct[ing]' the aides '*in the interest of the employer.*'" *Id.* at 40a (emphasis added). The ALJ discounted the evidence of responsible direction because the "nurses' focus is on the well-being of the residents rather than of the employer." *Id.* The ALJ also suggested that the direction given "is closely akin to the kind of directing done by leadmen or straw bosses." *Id.*

The ALJ also found that the nurses did not have authority to "discharge," "reward," "discipline other employees," or "to adjust their grievances," within the meaning of Section 2(11). The ALJ's determination rested on the view that the nurses themselves did not possess personnel authority to impose penalties upon the aides (*id.* at 44a), and that the record did not reveal that an aide had been fired solely as a result of a poor performance appraisal submitted by a staff nurse. *Id.* at 45a. The ALJ reached this conclusion despite his finding that staff nurses routinely report deficiencies in the aides' performance to upper management and that "[s]ometimes these reports have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." *Id.* at 44a.[17]

2. Having concluded that the nurses were "employees," the ALJ considered the merits of the alleged unfair labor practices. The ALJ concluded that respondent legitimately discharged three nurses for their continued negativism and failure to work with management as a team.[18] *Id.* at 63a. He also found that respondent was justified in issuing warnings for excessive absences to three nurses, for improper documentation to two nurses, and for im-

[17] The ALJ simply ignored evidence that the nurses are authorized to terminate an aide for resident abuse. Tr. 1294-95.

[18] HCR's human rescources representative investigated complaints and learned that these three nurses caused many of the problems both within the facility and with its relationships to physicians and the community. Pet. App. 56a. The nurses were terminated because they refused to fulfill their obligations to promote the well being of the facility. *Id.* at 56a, 63a.

proper assignments to one nurse. *Id.* at 66a, 70a. The ALJ found, however, that two warnings issued by HCR to nurses for missing an in-service meeting did violate the Act. *Id.* at 68a.[19] He ordered HCR to remove those warnings from the affected employees' personnel files and to post an appropriate notice. *Id.* at 73a-74a.

**C. The Decision of the NLRB**

The General Counsel filed exceptions to the ALJ's decision, and HCR filed cross-exceptions. The Board disposed of the threshold supervisory issue in a footnote stating that "[t]he judge found, and we agree, that the Respondent's staff nurses are employees within the meaning of the Act." Pet. App. 13a n.1. The opinion does not reflect, in any respect, the legal or factual analysis that led it to affirm the ALJ's ruling on this issue.

The Board then rejected the ALJ's factual findings concerning HCR's discipline and discharge of the licensed practical nurses. The Board concluded that HCR violated the Act. Pet. App. 17a-27a.

**D. The Decision of the Court of Appeals**

The Sixth Circuit reversed the Board's decision. The court held that the staff nurses are "supervisors" within the meaning of Section 2(11) because their duties—assigning specific tasks to aides and responsibly directing the work of the aides—"require the use of independent judgment and are taken in the interests of the employer." Pet. App. 10a. The court concluded that the Board's decision was predicated on an erroneous interpretation of the Act, and was not supported by substantial evidence. Pet. App. 8a-11a.

1. Although the Board's opinion did not set forth any reasons for its resolution of the supervisory issue, the

[19] Although the nurses testified to other reasons for missing the in-service meeting, the ALJ concluded that HCR disciplined them because it believed their absence from the meeting was protected concerted activity.



court read the decision as a conclusory application of the Board's rule concerning the supervisory status of nurses. The court of appeals observed that, "[t]he Board has always taken the position that a nurse is not a supervisor when her conduct is in the furtherance of the patient's interest" because the Board maintains that such nurses are "working for the patient's interests, not the interests of their employers." *Id.* at 8a. The court of appeals noted that it had previously rejected the Board's construction of the Act and held that nurses who meet the statutory definition of supervisor are not disqualified from being supervisors simply because their duties are largely devoted to the care of nursing home residents. *Id. See NLRB v. Beacon Light Christian Nursing Home,* 825 F.2d 1076 (6th Cir. 1987); *Beverly California Corp. v. NLRB,* 970 F.2d 1548 (6th Cir. 1992).[20] Despite this precedent, the Board sought affirmance of its order in this case, asserting that "direction of other employees is supervisory only if it goes beyond the needs of patient care." Govt. C.A. Br. at 23.

Relying on its earlier decisions in *Beacon Light* and in *Beverly California Corp.,* the court concluded that the Board's patient care rule could not be reconciled with the language or purposes of the statute. First, the court observed that the language requires a finding that "any" individual who "meets the statutory tests" is a "supervisor" and that "there is no exception for supervisors in the health care field." Pet. App. 7a (*quoting Beverly California Corp.,* 970 F.2d at 1552). The court emphasized that the definition of supervisor is clearly stated, has remained unchanged since Congress enacted the Taft-Hartley Act in 1947, and that Congress considered excluding registered nurses from the defiintion of supervisors in 1974, but did not do so. Pet. App. 7a. As the

[20] In *Beacon Light* and in *Beverly California Corp.,* the Sixth Circuit reversed Board decisions holding that nurses were not supervisors because they purportedly directed employees in the interest of the resident and not in the interest of the nursing home.

Sixth Circuit concluded in *Beacon Light,* "if Congress had desired to remove health care supervisors from the pre-existing class of supervisors in the Health Care Amendments of 1974, Pub.L.No. 93-360, 93d Cong., 2d Sess., 1974 U.S. Cong. & Admin. News 3946, it certainly knew how to express such a change in the text of the Amendments." 825 F.2d at 1080; *see also* Pet. App. 11a.

The court also emphasized the importance of the definition of supervisor to the purposes of the statutory scheme. The court observed that "[t]he exclusion of supervisors from coverage under the Act was considered essential to allow employers to have the undistracted allegiance of employees in key positions" and that Congress excluded supervisors to maintain "a reasonable balance of power between employers and unions which could potentially arise if supervisors were themselves union members." Pet. App. 6a-7a. The Board's rule, according to the court, impermissibly ignored these statutory distinctions between supervisors and employees.

2. Assessing the record without reliance on the Board's view that "mere patient care" does not constitute statutory supervision, the court found that "the staff nurses are indeed supervisors within the definition of Section 2(11)." Pet. App. 8a-9a. The court of appeals found that HCR's evidence concerning supervisory status of the staff nurses was "clear" and that staff nurses "must" be considered supervisors because they had "authority to assign the nurses aides and to responsibly direct them"—two of the 12 functions set forth in 29 U.S.C. 152(11)[21]

[21] Contrary to petitioner's suggestion (Pet. Br. at 13), the court of appeals did not reject HCR's argument that the staff nurses performed other supervisory functions as well. The opinion states that the two activities cited by the court were "among" the nurses' functions (Pet. App. 9a) and that proof of *"any one"* (*id.* at 10a) of the enumerated functions was sufficient. If this Court adopts the Board's interpretation of the statute, the court of appeals' decision should be affirmed on these alternate grounds or remanded for further consideration.



—and that authority was exercised "in the interests of the employer," and "require[s] the use of independent judgment." Pet. App. 9a-10a.

The court summarized the extensive evidence concerning the nurses' authority to exercise discretion in the assignment of work to the aides and concluded that the staff nurses' duties "clearly require both assigning aides to specific tasks" and "directing the operation of the aides, as well as the entire nursing home" at various times of the day. Pet. App. 10a. The court accordingly concluded that the Board had failed to meet its burden of establishing that the staff nurses were not supervisors within the meaning of the Act.[22] The court granted the petition for review and denied the Board's cross application for enforcement.[23]

## SUMMARY OF THE ARGUMENT

I. A. The Board contends that licensed practical nurses employed by HCR who serve as direct superiors to nurse aides are not "supervisors" under Section 2(11) of the Act. 29 U.S.C. 152(11). Petitioner asks this Court to defer to the Board's view that a nurse's direction of aides is not pursuant to "authority, in the interest of the employer," as required by Section 2(11). 29 U.S.C. 152(11). The Board reads this phrase to mean that a nurse exercises authority "in the interest of the employer" only when performing personnel functions that affect job status or pay. Pet. Br. at 20. The language of the phrase plainly does not draw such a line, and other

[22] The court of appeals also found that HCR had submitted substantial evidence to support its claim that the LPNs were supervisors. Pet. App. 9a. In any event, this Court declined to grant certiorari on the question whether the court of appeals properly allocated the burden of proof. Jt. App. 128.

[23] The court found that "[s]ince the staff nurses are supervisors and not covered under the Act" it "need not review the merits of the unfair labor practice claims." Pet. App. 11a. In the event of a reversal in this Court, this issue would remain open on remand.

language in Section 2(11) forecloses the Board's construction. There is accordingly no basis to afford any deference to the Board's interpretation.

B. The statute clearly establishes that Congress decided *not* to make "personnel authority" that affects job status or pay a prerequisite for supervisory status. An employee who "discipline[s]" *or* "responsibly . . . directs" *or* does other enumerated tasks is a supervisor if the other statutory criteria are met. 29 U.S.C. 152(11). Further, the rule advanced by the Board is inconsistent with the statutory requirement that the same definition of "supervisor" must apply to "any" employee. *Id.* Yet here, the Board only seeks to apply its rule of interpretation to employees who rely upon "professional norms" to perform their duties. Pet. Br. at 25. The unambiguous language of the statute forecloses this result.

This Court, moreover, has previously determined that the same phrase in issue here—"the interest of the employer"—should be given its ordinary meaning. In *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-89 (1947), this Court rejected the interpretation adopted in the dissenting opinion which—like the Board in this case—construed this phrase to refer solely to employees with authority to formulate and execute labor policies. *Id.* at 496. The Court found, instead, that this phrase represented "an adaptation of the ancient maxim of the common law, respondeat superior." *Id.* at 489. More recently, in *NLRB v. Yeshiva University*, 444 U.S. 678, 684 (1980), this Court found that an employee who acts pursuant to "professional interests" is acting in furtherance of the employer's interest because "the two are essentially the same."

C. The Board asks this Court to determine the meaning of the language adopted by Congress in 1947 through reference to statements in committee reports drafted in 1974 to accompany legislation that *made no change* in the statutory definition of "supervisor." Such



statements are inherently unreliable, and not entitled to any significant weight. The statements do not, in any event, support the Board. At best, the statements relied upon suggest that the Board should adhere to its pre-1974 precedents. The Board in fact has not done so. Prior to 1974, the Board granted supervisory status to nurses through the application of the same statutory criteria that it uses in any other context. This Court should require the Board to resume its prior practice—the only practice permitted by the statute.

D. The Board's rule is also not supported by its invocation of underlying policies. The best way to ensure that Congressional policies are fostered is to adhere to the words Congress wrote. The Board's policy concerns are not well grounded in any event. First, the Board contends that a literal interpretation will deny organizational rights to employees who do not engage in any functions that demand undivided loyalty. This is so, says the Board, because nurses who direct aides act pursuant to "professional norms," which serve to prevent any potential for divided loyalty. This reasoning does not make any sense. An employee who has significant responsibility to oversee the work of other employees, and to report infractions to management, must have undivided loyalty to the employer. The Board's argument echoes the one that it made in *Yeshiva*. There, the Board said there was no "danger of divided loyalty" because the university expected its faculty to "pursue professional values rather than institutional interests." 444 U.S. at 688. This Court disagreed. *Id.* at 688-90.

Nor does application of the statutory criteria lead to the wholesale exclusion of professionals from the Act, as petitioner contends. The Board's rule, however, would preclude supervisory status for all professionals except those who exercise the power to discipline employees. And, as its position in this case reflects, the Board exceeds the logic of its own rule by seeking to

apply it here to licensed practical nurses who are not even professionals.

II. Petitioner requests this Court to find that HCR's staff nurses do not possess supervisory authority under the Board's test. Pet. Br. at 31. Because the Board's test "rests on erroneous legal foundations," the Board's order in this case cannot be upheld. *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1922) (*quoting NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105, 112 (1956)). As the court of appeals found, the evidence is "clear" that HCR vested its staff nurses with authority to "assign" and "responsibly to direct" aides in the interest of HCR. Pet. App. 10a. The ALJ found that the staff nurses regularly "criticize" aides for "improper performance of their work" and "routinely report problems about an aide's work or attendance to [upper management]." Pet. App. 40a. HCR's staff nurses are "in charge" of a wing of the facility for an entire shift (Pet. App. 48a), and they are the "senior personnel" present during most of the facility's operating hours. Pet. App. 46a. As the ALJ acknowledged, "in common parlance" (Pet. App. 48a), HCR's nurses are supervisors. They are also "supervisors" under Board precedents that apply the statutory criteria, instead of the special "patient care" rule that the Board devised to enlarge the organizational rights of nurses beyond that afforded by Congress. The decision of the court of appeals should be affirmed.



## ARGUMENT

### I. THE COURT OF APPEALS WAS NOT REQUIRED TO DEFER TO THE BOARD'S LEGAL STANDARD FOR DETERMINING WHEN A NURSE IS A "SUPERVISOR" WITHIN THE MEANING OF 29 U.S.C. 152(11) BECAUSE THAT STANDARD CONFLICTS WITH THE STATUTORY LANGUAGE

In this case, the Board found that the licensed practical nurses who serve as the senior personnel in the nursing home during 75% of its operating hours are not "supervisors," even though they have the primary responsibility for ensuring that subordinate employees provide quality care to the residents. The Board defends its determination that these nurses are not "supervisors" on the ground that the direction of "patient care" is not activity performed "in the interest of the employer," as that term is used in the statute. Pet. at 11. The Board claims that nurses act "in the interest of the employer" only if they exercise "personnel authority" that can "affect the aides' job status or pay." Pet. Br. at 20. The court of appeals properly declined to give any deference to the Board's interpretation because it cannot be reconciled with the language of the Act, and it is inconsistent with this Court's prior precedents. *See, e.g., Public Employees Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to an agency interpretation at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."); *Florida Power and Light Co. v. International Bhd. of Elec. Workers, Local 641*, 417 U.S. 790 (1974) (declining to adopt Board's definition of the class of supervisors entitled to protection from union discipline under Section 8(a)(1)(B) of the Act); *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 847-48 (1992) (declining to defer to the Board's interpretation of the Act where the

Board had not properly interpreted prior decisions of this Court).[24]

**A. The Statutory Requirements For Supervisory Status**

1. Prior to 1947, the NLRA did not exclude supervisors from the protections afforded by the Act. Section 2(3) of the NLRA provided, at that time, that the term "employee" shall include "any employee." Act of July 5, 1935, ch. 372, § 2(3), 49 Stat. 450. Relying on the plain language of that definition, this Court held in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), that foremen supervising an employers' workforce were entitled to unionize because Congress had not said otherwise.

Congress responded to this imbalance in 1947 by excluding supervisors from the definition of employees entitled to engage in concerted activity. *See* National Labor Relations Act, ch. 120, Tit. I, § 101, 61 Stat. 137-138 (codified at 29 U.S.C. 152(3)) (the term "employee shall not include . . . an individual employed as a supervisor"); 29 U.S.C. 164(a) ("[N]o employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"). The purpose of these amendments was to "assure the employer of the loyalty of his supervisors." *Florida Power and Light Co.*, 417 U.S. at 808; *see also Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-62 (1974) (finding that Congress' "dominant purpose" was to "redress a perceived imbalance . . . that was found to arise from putting supervisors in the position of serving two masters with opposed interests").

2. The definition of supervisor adopted in the 1947 amendments to the NLRA has never been modified. The statute defines a supervisor as:

[24] Even under a deferential standard of review, however, the Board's interpretation should be rejected because it is unreasonable, and has not been consistent. *See* discussion *infra* at 35-37; *see also* amicus brief of American Health Care Association (AHCA).



> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. 152(11).

The language of this section reveals three prerequisites for a finding of supervisory status. First, the individual must have authority to perform *one* of the 12 functions listed in Section 2(11). The use of the word "or" to separate the enumerated functions leaves no doubt that the statute must be read in the disjunctive. *See* Pet. App. 8a; *see also Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); National Labor Relations Board, *Twenty-Fifth Annual Report* at 45 (1960). Second, the statute provides that the individual must "hav[e]" the "authority" to perform that function "in the interest of the employer." Third, the individual's "exercise of such authority" cannot be "merely routine" or "clerical," but must require "the use of independent judgment." 29 U.S.C. 152(11).

The Board contends that respondent's staff nurses were not supervisors under its rule even to the extent they used "independent judgment" to perform functions listed in Section 2(11). The central issue presented by the Board, therefore, is whether nurses who use independent judgment to "assign" and "responsibly to direct" aides are exercising authority "in the interest of the employer."[25]

[25] The Board does not ask this Court to uphold its order in this case under any other theory. Pet. Br. at 13, 31, 33-34.

### B. The Board's Interpretation Of The Statutory Requirement That Employees Must Be Authorized To Perform Supervisory Functions "In The Interest Of The Employer" Conflicts With The Plain Language Of The Act And This Court's Precedents

Petitioner concedes that when HCR's staff nurses exercise authority over the aides' delivery of care to nursing home residents, they are acting in a way that furthers HCR's business interests. Pet. Br. at 25. The Board could not possibly contend otherwise. *Cf., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978) (noting that the function of a hospital is "patient care"). The Board nevertheless asserts that "[i]f [the phrase] is to have significance," it cannot be interpreted literally. Pet. Br. at 25. Instead, the Board contends it should be read to mean that nurses directing the work of aides act "in the interest of the employer" only when they are vested with "personnel authority" to affect the job status or pay of aides. Pet. Br. at 20; Pet. at 16. Under the Board's interpretation, nurses act "in the interest of the employer" when they discharge an aide, but do not act "in the interest of the employer," when they direct the aides' delivery of "patient care" pursuant to "professional norms." Pet. Br. at 24. The statute, of course, does not include any such words of limitation. It says "in the interest of the employer," 29 U.S.C. 152(11)—not just the "personnel" or "managerial" interests of the employer. As this Court has noted on other occasions, "[t]he short answer [to the Board's contention] is that Congress did not write the statute that way." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (*quoting United States v. Naftalin*, 441 U.S. 768, 773 (1979)).

1. The Board's interpretation of the phrase "interest of the employer" is contrary to its ordinary meaning, and is also refuted by other language used to define "supervisor." The court of appeals correctly held that the Board's interpretation conflicts with the statute.



a. The Board contends that a health care professional does not act in the "interest of the employer" absent personnel authority to affect the job status or pay of subordinate employees. The disjunctive language of Section 2(11), however, makes it absolutely clear that Congress *did not* make such personnel authority a prerequisite for supervisory status. Section 2(11) describes three distinct categories of supervisory activities. The first of the three clauses encompasses authority that could be described as "personnel authority." That clause includes authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." The second clause, in contrast, only includes authority "responsibly to direct" other employees. The third clause encompasses authority to "adjust [employees'] grievances." By separately including responsible direction of employees within the list of supervisory functions, Congress clearly established that an employee does not have to exercise the types of personnel authority listed in the first of the three clauses to be a supervisor.

Both the Board,[26] and the courts,[27] have recognized in other contexts that personnel authority to hire, fire, and

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[26] *See Dale Service Corp.*, 269 NLRB 924 (1974) (senior operators at sewage treatment plant are supervisors where they assign and adjust workloads, approve overtime, and are responsible in general manager's absence); *Warren Petroleum Corp.*, 97 NLRB 1458 (1952) (chemist who responsibly controlled and directed activities of assistant was a supervisor despite his lack of authority to hire, fire, or otherwise effect changes in the status of assistants); *Sarah Neuman Nursing Home*, 270 NLRB 663, 675-77 (1984) (technical food service employee who responsibly directs lesser skilled and lesser educated employees is a supervisor). *See also Massachusetts Coastal Seafoods, Inc.*, 293 NLRB 496, 506 (1989); *Clark & Wilkins Indus. Inc.*, 290 NLRB 106, 114-15 (1988); *Iron Mountain Forge Corp.*, 278 NLRB 255, 257-59, 262 (1986).

[27] *See, e.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 897 (1949) (holding that control operators who "have no authority to hire or fire" are supervisors because they are "charged with the responsible direction of the generating unit and the men under him."); *see also Yeshiva*, 444 U.S. at 682 n.13

discipline employees is *not* a prerequisite for supervisory status because responsible direction is all that Congress required. Indeed, the language "responsibly to direct" was added to the definition of "supervisor" to clarify that a supervisor does not have to possess personnel authority.[28] The Senator who sponsored the amendment proposed this language because the bill seemed "to cover

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(noting that "[a]n employee may be excluded if he has authority over *any one* of 12 enumerated personnel actions, *including* hiring and firing") (emphasis added); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960) (the head of a news department was a supervisor despite absence of personnel authority because the authority to direct or assign his reported subordinates in the performance of their reportorial duties was responsible direction); *NLRB v. McCullough Envtl. Servs.*, 144 LRRM 2626, 2639 (5th Cir. 1993) (lead operators at sewage treatment plant responsibly directed work where they were highest ranking official on duty and were responsible for operation of plant for more than 75% of its operating hours); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (shift operating supervisors who had authority to responsibly direct other employees were supervisors despite the absence of authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971) (persons who responsibly directed employees in the field after business hours and during emergencies were supervisors within the meaning of the Act.); *Keener Rubber, Inc. v. NLRB*, 326 F.2d 968 (6th Cir. 1964) (want of authority to hire, fire, lay off, recall, promote or discharge employees did not preclude classification as supervisor, where person was in charge in shift and responsibly directed employees).

[28] The Senate bill initially defined supervisor as follows:

> (11) The term supervisor 'means any individual having authority, in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

93 Cong. Rec. 4677-4678 (1947).



adequately everything except the basic act of supervising staff." [29]

Even though the disjunctive clauses of Section 2(11) make it clear that "personnel authority" is not a prerequisite for supervisory status, the Board nevertheless asserts that this Court should construe the phrase "in the interest of the employer" to impose that precise requirement. The Board's interpretation deprives the phrase "responsibly to direct" of any meaning whatsoever. Under the Board's view, responsible direction could never constitute a basis for supervisory status in the absence of authority to perform functions listed in the other clauses of the section. This Court will not defer to interpretations that do not give effect to all the words chosen by Congress. *See, e.g.*,

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[29] The sponsor offered the amendment on the Senate floor and explained its purpose in the following terms:

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this Act seems to me to cover adequately everything except the basic act of supervising staff. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department or other work instead of discharging, disciplining or otherwise following the recommended actions.
>
> In fact, under some modern management methods the supervisor might be deprived of authority for most of the functions enumerated and still have large responsibility for the exercise of personal judgment based on personal experience, training and abilities. He is charged with the responsible direction of his department and the men under him. He determines under general order what jobs shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. Such men are above the grade of 'straw bosses, leadmen, set-up men, and other minor supervisory employees, as enumerated in the [Senate Committee] report.' Their essential managerial duties are best defined by the words, "direct responsibly," which I am suggesting.

93 Cong. Rec. 4677-4678 (1947).

*Florida Power*, 417 U.S. at 803. The court of appeals properly rejected the Board's interpretation on this ground. Pet. App. 8a.

b. The court of appeals was also correct in its view that the Board's rule is inconsistent with the statutory mandate that the same definition of "supervisor" must apply to "any" employee. 29 U.S.C. 152(11); Pet. App. 7a. The Board cannot, therefore, define "the interest of the employer" to mean one thing for health care workers and another thing for workers in other industries. Nor did Congress establish a different statutory definition of supervisors for professional employees. Congress instead provided that "any" employee given "authority, in the interest of the employer" to engage in activity defined as supervisory is excluded from coverage under the Act. 29 U.S.C. 152(11). The same statutory criteria must be applied to nurses, carpenters, or truck drivers. The statute makes no distinction.

c. The Board's construction also ignores the full text of the operative phrase. Supervisors include those individuals "*having authority*, in the interest of the employer." 29 U.S.C. 152(11) (emphasis added). The Board's interpretation pays no heed to the first two words of the phrase. The Board contends that when a nurse directs an aide in reliance on "professional norms" rather than "management's business norms" (Pet. Br. at 25), the nurse is not acting in "the interest of the employer." But the Board's argument ignores the fact that the test for supervision turns on the nature of the employee's "authority" to perform supervisory activity. While nurses may use "professional norms" in deciding how to direct the activities of subordinate employees, their "authority" must come from the employer. The professional employee, the licensed practical nurse, and the skilled carpenter alike have no "authority" to direct other employees solely by virtue of their training or education. The nurses' "authority" to "assign" and "responsibly to direct" the activities of the aides in the nursing home is conferred only by the em-



ployer—in its own interest—and not by professional norms.

2. On two occasions, this Court has rejected arguments that this phrase—the "interest of the employer"—should not be given its ordinary meaning. *See Packard Motor*, 330 U.S. at 488-89; *Yeshiva*, 444 U.S. at 687, 688. Those decisions should be controlling here as well.

a. In *Packard Motor*, 330 U.S. at 488-89, this Court adopted a literal construction of the same statutory phrase that now appears in Section 2(11), 29 U.S.C. 152(11). Prior to the passage of the Taft-Hartley amendments in 1947, the term "employer" was defined to include "any person acting in the interest of an employer." *Id.* at 488 (*citing* 1935 National Labor Relations Act § 2(2), 49 Stat. 450). The issue in *Packard* was whether foremen who supervised employees were protected by the Act. The petitioner argued that employees who exercised supervisory authority should be included within the definition of "employer" under the Act, and excluded from the definition of "employee." 330 U.S. at 488. The petitioner's argument was based upon the fact that "employer" was defined to include persons who acted "in the interest of an employer." The Court considered whether that phrase could be read to refer solely to employees acting in a supervisory capacity and not to other employees. *Id.* The Court rejected this circumscribed construction of the language, observing that the statutory phrase represented "an adaptation of the ancient maxim of the common law, respondeat superior." *Id.* at 489. The dissenting opinion, like the Board in this case, construed the phrase to refer solely to employees with authority to formulate and execute labor policies. *Id.* at 496. The Court, however, found that it referred to every employee who "owes to the employer faithful performance of service in his interest." *Id.* at 489; *see also Carbon Fuel Co. v. United Mine Workers of America*, 444 U.S. 212, 217 (1979) (describing the phrase construed in *Packard Motor* as a "very loose test of responsibility").

The *Packard Motor* interpretation of "the interest of the employer" as a loose "adaptation of . . . respondeat superior" should control here as well. First, Congress drafted the definition of Section 2(11) in 1947 to incorporate the same language construed in *Packard Motor*. It is doubtful that Congress would have chosen these precise words if it did not intend for them to be construed according to the Court's interpretation in *Packard Motor*.[30] Second, the interpretation adopted in *Packard Motor* makes sense in this case. As the Court noted in *Packard Motor*, 330 U.S. at 489, the definitions of employee and employer should be read to differentiate between actions taken by employees in their own personal interest, and actions taken in furtherance of the employer's business interest. If Congress had not defined supervisors with reference to the "interest of the employer," the literal language of the section would extend to a variety of actions that Congress did not intend to encompass. For example, union stewards often have authority to "adjust grievances" exercising "independent judgment." 29 U.S.C. 152(11). The only reason they are not "supervisors" is because they are not individuals "having authority, in the interest of the employer" to adjust grievances.[31] The court

[30] This rule of construction has special force in this case because Congress chose to change the language used in § 2(2)—the definition of employer—at the same time that it incorporated that phrase into § 2(11). In *Carbon Fuel*, the Court noted that Congress amended the definition of "employer" in 1947 to adopt a somewhat more restricted "common-law agency test." 444 U.S. at 217. *See* 29 U.S.C. 152(2) (defining "employer" as "any person acting as an agent of an employer"); *see also* H.R. Conf. Rep. No. 570, 80th Cong., 1st Sess., *reprinted in* 1947 U.S.C.C.A.N. 1135, 1137 (explaining the changes as a response to Board decisions finding an employer responsible "for the acts of subordinate employees and others although not acting within the scope of any authority from the employer, real or apparent"). This same "loose test of responsibility," *Carbon Fuel*, 444 U.S. at 217, was nevertheless used to define supervisors in the 1947 amendments.

[31] Similarly, the Board and courts have recognized that the statute requires differentiation between acts undertaken by an employee in his personal capacity as an owner of property, and actions undertaken pursuant to "authority, in the interest of the employer." *See, e.g., Deaton Truck Line, Inc. v. NLRB*, 337 F.2d 697 (5th Cir. 1964), *cert. denied*, 381 U.S. 903 (1965) (court affirmed Board order that owner-operators of trucks were supervisors and acted in the "interest of the employer" because owner-operators' interest in protecting their investment and employer's interest in making profit were so intertwined that powers were exercised for both); *National Freight, Inc.*, 146 NLRB 144 (1964) (distinguishing between a truck driver's interest as an owner of a vehicle and the employer's interest and suggesting that actions "integral" to the employer's business operations should be construed as actions taken "in the interest of the employer"). *Cf., NLRB v. Scott Paper Co.*, 440 F.2d 625, 630 (1st Cir. 1971) (court rejected Board's argument that tractor owner-operators were not supervisors because the court found that their interest and the interest of the employer company "were so intertwined that the powers were exercised for both").



of appeals correctly determined that it is not necessary to rewrite the statutory language to give it meaning, and the interpretation of the same phrase adopted in *Packard* should control.

b. This Court also rejected the Board's effort to depart from a literal interpretation of actions taken "in the interest of the employer" in *NLRB v. Yeshiva University*, 444 U.S. at 688. In that case, the Board argued that faculty members who formulated and implemented policy for the university should be protected by the Act because they were not supervisory or managerial employees. The Board's argument was almost indistinguishable from that advanced here. The Board asserted that the faculty did not perform their policy functions "in the interest of the employer," because the faculty's actions were guided by their own professional judgment and not by management policies. 444 U.S. at 678, 684. In the context of construing the implied "managerial" exception to the Act, the Court declined to accept the Board's circumscribed definition of actions undertaken in the "interest of the employer."

This Court concluded in *Yeshiva* that the Board did not have authority to draw the line between managers and employees by determining whether their actions were guided by their own professional interests or those of the

institution. The Court held that the faculty's "professional interests" simply "cannot be separated from those of the institution" because there can be "no doubt that the quest for academic excellence and institutional distinction is a 'policy' to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal." 444 U.S. at 688. The Court accordingly concluded that it is "fruitless to ask whether an employee is 'expected to conform' to one goal or another when the two are essentially the same." *Id.*[32] So too here. There is simply no basis in the language of the statute to conclude that direction given to aides in the interest of nursing home residents, pursuant to professional norms, is not "in the interest of the employer."

### C. The Board's Interpretation Is Neither Required Nor Supported by the 1974 Health Care Amendments

The Board's interpretation of "the interest of the employer" has no foundation whatsoever in the words actually chosen by Congress. It is therefore not surprising that the Board seeks support for its rule in pages of the congressional record. Petitioner contends that this Court should reject the ordinary meaning of the language adopted by Congress in 1947 in reliance upon statements in committee reports concerning amendments to *other sections* of the NLRA in 1974. National Labor Relations Act Amendment of 1974, Pub. L. No. 93-360, 88 Stat. 395; Pet. Br. at 18-19. It is not appropriate, however, to consult this history because the language is clear. *See, e.g., Packard*, 330 U.S. at 492. In any event, the court of appeals correctly determined that the 1974 health care amendments do not support the Board's interpretation of the Act. Pet. App. 7a.

1. As the court of appeals found, the most significant thing about the 1974 health care amendments is what

[32] Although it did not specifically refer to *Yeshiva*, the Board recently described the *Yeshiva* holding as "an argument" and stated that, "We [the Board] find that argument too simplistic." *Northcrest Nursing Home*, 313 NLRB No. 54 at 4 (Nov. 26 1993).



Congress did, not what it said. Pet. App. 7a. At the conclusion of extensive legislative debates, Congress extended the protections of the NLRA to employees of nonprofit hospitals, but made *no changes* to the definition of supervisor adopted in 1947. The court correctly noted that "[i]n 1974 the Senate Labor Committee considered recommending enactment of legislation to create such an exception, but the idea was dropped." Pet. App. 7a-8a (*quoting Beverly California Corp.*, 970 F.2d at 1551-1552); *see* S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974) ("Senate Report").

Before the 1974 amendments, a number of interest groups urged Congress to amend Section 2(11), 29 U.S.C. 152(11), to exclude *registered* nurses and other health care professionals. A representative of the American Nurses' Association ("ANA") explained the reason for seeking the amendment:

> Almost all nurses exercise independent judgment and professional authority to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses.

Coverage of Non-Profit Hospitals Under National Labor Relations Act, 1972, Hearings on H.R. 11357 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. 16, 17-18.[33] In other words, the ANA urged Congress to amend the definition of supervisor because nurses who do not have personnel authority to affect the job status of subordinate

[33] Representatives of the ANA testified that their "primary difficulty has been the interpretation of supervisors in relation to professionals." Hearings at 67.

employees could otherwise be found to be supervisors under the definition set forth in § 2(11). The test proposed by the ANA, which Congress chose not to adopt, bears a striking resemblance to the test the Board asks this Court to accept in this case. Because Congress chose not to "carve out an exception for the health care field," (Pet. App. 11a), the court of appeals correctly determined that the Board had no authority to do so.

2. Even though Congress did not amend the statute to incorporate the ANA's definition of supervisor, petitioner urges adoption of its rule based upon statements in the committee reports observing that the proposed amendments were "unnecessary because of existing Board decisions." S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); Pet. Br. at 19. As set forth below, the passage of the report relied upon by petitioner did not express agreement with the rule advanced in this case. Even if it did, however, this Court has repeatedly declined to permit plain statutory language to be altered by subsequent legislative history. *See, e.g., Sullivan v. Finkelstein,* 496 U.S. 617, 628-29 n.8 (1990); *Public Employees Retirement Sys. v. Betts,* 492 U.S. 158, 168 (1989) (legislative history that is not linked to the enactment of statutory language is not entitled to significant weight). As this Court noted in *American Hosp. Ass'n v. NLRB,* 111 S. Ct. 1539, 1545 (1991), such statements cannot have the "force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *See also Pierce v. Underwood,* 487 U.S. 522, 566 (1988) (rejecting respondent's reliance on a 1985 House committee report interpreting attorneys' fees provisions in a 1980 statute because "[i]t is the function of the courts and not the legislature, much less a committee of one house of the legislature, to say what an enacted statute means").

This Court has also recognized that such statements simply cannot be trusted to give any reliable indication of what the original Congress intended, or even what motivated the subsequent Congress to reject proposed



amendments. *See, e.g., United States v. Wise,* 370 U.S. 405, 411 (1962) (rejecting interpretation offered by subsequent committee report because "[l]ogically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members"); *United States v. Price,* 361 U.S. 304, 313 (1960) (stating that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

These concerns have particular force in this case because portions of the legislative history, not cited by petitioner, demonstrate why such committee statements are inherently unreliable and not entitled to any significant weight. During the course of the legislative hearings, the sponsor of the 1974 amendments, Congressman Thompson, advised ANA representatives that the committee might be able to address their concerns about the supervisory status of registered nurses by "making legislative history" because Board representatives had advised him that "they would be able to handle the supervisor problem" if they had a "strong legislative history." [34] This colloquy provides an additional basis for concluding that the

[34] The full text of Congressman Thompson's statement is as follows:

> In devising the report this year we shall attempt to strengthen that language respecting the status of registered nurses. One major difficulty is in drafting the language to include in such a bill. The second is in making legislative history, which we can do in the report and in colloquy on the floor, which would have the same effect of calling the Board's attention in the likely event this becomes law, to that particular situation.
>
> I talked with the new Solicitor of the Board, who was formerly minority counsel to this Committee and is a very able man. I also talked to members of the Board, and they would anticipate that even absent specific statutory language with a strong legislative history, they would be able to handle this supervisor problem. They are quite aware of it.

Hearings on H.R. 1236 before the Special Subcomm. on Labor at the House Comm. on Education and Labor, 93d Cong., 1st Sess. 23-24

statements that ultimately found their way into the committee reports—those now relied upon by petitioner—should not be viewed as an autho itative expression of congressional will. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-120 (1980) (noting the importance of examining the background of a committee statement in order to evaluate its weight).

This Court has in fact rejected arguments that the Board's authority should be construed through reference to the legislative history of the 1974 amendments rather than through the language of the Act as written. In *American Hospital Ass'n v. NLRB*, 111 S. Ct. 1539 (1991), the petitioner challenged the Board's promulgation of a rule establishing eight bargaining units in acute care hospitals. Petitioner relied upon the legislative history of the 1974 amendments that purported to support a four-unit rule. The Court declined to give this history any significant weight, construing the scope of the Board's authority in accordance with the language of the statute as written. The same approach should be followed here.

3. Even if this Court determines that the subsequent legislative history should be accorded some weight, the committee reports do not mean what petitioner says. In this case, petitioner contends that licensed practical nurses overseeing the work of a substantial number of aides in a nursing home are not statutory supervisors. The legislative history relied upon by petitioner and amicus, however, relates solely to *registered* nurses and other health care professionals. It is also focused primarily on the status of nurses in hospitals. There is no mention of licensed practical nurses in nursing homes, who are ad-

(1973). The notion that the legislative history was simply "made up" in response to the ANA's lobbying finds support in the Board's recent statement that before 1974 it had not applied to nursing homes what it now calls the patient care/professional/technical rule. *See Northcrest Nursing Home*, 313 NLRB No. 54 at 4, n.12 (1993). The Board's extraordinary action at this time in expressly overruling its pre-1974 decisions undermines the Board's position that its rule finds support in the 1974 Health Care Amendments.



mittedly "technical" employees. The Board's reliance on the purported legislative history is, therefore, misplaced.[35]

Moreover, the 1974 Committee Reports did not approve the rule petitioner articulates in this case. The Senate Committee instead expressed its expectation that the Board would analyze cases involving nurses the way it did before the amendments. Senate Report at 6. The Board has not in fact done so. Prior to 1974, the Board did not exclude nurses from the definition of supervisors simply because the activities they directed involved patient care.[36] Indeed, the Board's pre-1974 cases upheld the supervisory status of nurses who possessed less authority than the nurses employed by HCR. For example, in *University Nursing Home, Inc.*, 168 NLRB 263, 265 (1967), the Board stated:

> The licensed practical nurse at issue . . . is the nurse in charge of one of the three wings. She supervises the work of three nurses aides and one orderly in the performance of tasks of changing bed linens, bathing, feeding, massaging, and otherwise caring for patients in accordance with physician's instructions. . . . We find that the licensed practical nurse is a supervisor within the meaning of the act, and shall exclude her from the unit.

[35] The structure of the nursing department and the role of a nurse in a hospital are quite different from that of a nurse in a nursing home. *See Park Manor Care Center, Inc.*, 305 NLRB No. 135 (1991). In a typical nursing home, licensed practical nurses and nurses aides provide most of the care to the residents. There are typically more aides than nurses, and fewer supervisory levels than in hospitals. Pet. App. 34a. *Compare, e.g., Albany Medical Center*, 273 NLRB 485 (1985) and *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969) *with Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972); *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982); *Northwoods Manor*, 260 NLRB 854 (1982); *Wedgewood Health Care*, 267 NLRB 525 (1983); and *Pine Manor Nursing Center*, 270 NLRB 1008 (1984).

[36] Indeed, the ANA's complaint was that the Board was determining that nurses were supervisors. *See supra* n.33.

*Id.* at 265. Similarly, in *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972), the Board concluded that a nurse who was placed in charge of a section of a nursing home and had the authority to assign work to three or four aides and to report problems with their performance was a supervisor. The Board reasoned:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely. Furthermore, power to *enforce* important personnel policies, rules, and regulations is certain to require the exercise of independent judgment. Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules, short of such authority, is compelling evidence that their direction and assignment of employees is substantial and meaningful. The employees were notified of this power of the nurses and expected to obey their directions and assignments and interpretation of the Respondent's policies and rules.

*Id.* at 706 (emphasis in original).[37]

[37] *See also Garrard Convalescent Home, Inc.*, 199 NLRB 711, 717 (1972) (nurse who was in charge of five or six employees on her shift and who had authority to call employees in to cover absences and to send employees home if they were not doing their work was a supervisor within the meaning of the Act); *Donovon, d/b/a New Fairview Hall Convalescent Home*, 206 NLRB 688, 749 (1973) (nurse found to be a supervisor based upon her role in the assignment, direction and evaluation of support staff); *Isaac Putterman d/b/a Rockville Nursing Center*, 193 NLRB 959, 962 (1971) (nurse who responsibly directed non-professional support personnel was supervisor); *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969) (floor head nurses in hospital who assigned nurses and nurses' aides to particular patients and directed them as to how and when particular procedures should be performed, and who periodically evaluated work of those under them are supervisors).



Apparently recognizing that these cases severely undermine its interpretation, the Board, *after* submitting its brief in this case, simply overruled the pre-1974 cases:

> Prior to the 1974 Health Care amendments, the Board had found supervisory status based on assignments and direction in *Avon Convalescent Center*, 200 NLRB 702, 706 (1972) and *Rockville Nursing Center*, 193 NLRB 959, 862 (1971). Charge nurses in these cases were found supervisory because they utilized their professional judgment in assigning and directing other employees. *These cases are not consistent with the Board's current holdings which do not find supervisory status on this basis.* Accordingly, these cases are overruled.

*Northcrest Nursing Home*, 313 NLRB No. 54, at 4 n. 12 (Nov. 26, 1993) (emphasis added).

Prior to 1974, the Board applied the same test of supervisory status to health care workers as it did to all other employees. Through careful and considered application of the terms "responsibly to direct," "independent judgment," and "routine," the Board avoided the wholesale characterization of nurses as supervisors. The legislative history, at best, counsels the Board to continue doing what it used to do.[38] For the same reason, this Court's statement in *Yeshiva* that "Congress expressly approved" the Board's approach in 1974, 444 U.S. at 690 n.30, provides no basis for accepting the Board's position in this case.[39]

[38] The Board's continued reliance on the legislative history to support its position is curious in light of its admission that its present rule is inconsistent with pre-1974 decisions. *See Northcrest*, 313 NLRB No. 54 at 4. This admission also demonstrates that the cases cited by petitioner at page 22 of its brief are inapposite.

[39] Even if this Court's statement in *Yeshiva* could be read to suggest that Congress in fact approved the rule proffered by the Board in this case, that view should not be adopted here. The issue resolved in *Yeshiva* was whether the faculty members were man-

### D. Departure From the Language of the Statute Is Not Supported or Required by the Policies of the Act

The Board contends that this Court is required to defer to the Board's interpretation of the Act because it represents a rational way to implement underlying labor policies. This Court has repeatedly held, however, that the best way to ensure that congressional policies are furthered is to adhere to the words Congress wrote. *See, e.g., Florida Power and Light,* 417 U.S. at 811 (1974) (overturning a long line of Board decisions because "[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute" (*quoting Colgate-Palmolive Peet Co. v. NLRB,* 338 U.S. 355, 363 (1949))); *see also Packard Motor Car Co.,* 330 U.S. at 490 (finding that inclusion of foremen in the Act would undermine an employer's interest in securing the undivided loyalty of its supervisors, but that "the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms").

The policy justifications offered by the Board do not support its rule in any event. This Court has rejected efforts by the Board to limit the Act's exclusion of supervisory and managerial employees. *Yeshiva University,* 444 U.S. at 686-91 (declining to defer to the Board's interpretation of the managerial exclusion for university professors); *NLRB v. Bell Aerospace Co.,* 416 U.S. 267 (1974) (declining to defer to the Board's view that managerial employees are entitled to protection under the Act). This Court should do so here as well.

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agers excluded from the protection of the Act. The Court's discussion of the 1974 health care amendments and the Board's application of § 2(11) to health care professionals represent dicta that was in no way essential to the decision. On closely analogous facts, this Court has emphasized the propriety and importance of "reced[ing] from" similar characterizations of prior legislative history in a case where, as here, the issue is "squarely presented." *NLRB v. Hendricks County Rural Elec. Membership Corp.,* 454 U.S. 170, 188 (1981) (rejecting dicta in a prior decision concerning the interpretation of a Congressional committee report); *see also NLRB v. Boeing Co.,* 412 U.S. 67, 72 (1973).



1. The Board contends that its rule should be adopted because "[t]he conflict of loyalties that the supervisory exception is designed to avoid is not threatened when a nurse directs employees in reliance on professional norms rather than the managerial policies promulgated by the employer." Pet. Br. at 12. The Board contends that the "need for the employer to have the undivided loyalty of its agents" (Pet. Br. at 26) is implicated only when "nurses wield control over such assignment issues as who works what shift, effectively recommend or impose discipline, or effectively recommend or grant promotions or wage increases." Pet. Br. at 25-26. Otherwise, says the Board, there can be no conflict of loyalty because the nurses' direction of the aides will be based upon "professional norms" and "[s]uch an exercise of authority in the interest of patient care does not align the nurses with management." *Id.* at 24. This reasoning does not make any sense, and it was rejected in *Yeshiva.*

The language of Section 2(11) reveals that Congress clearly understood that the problem of divided loyalties would be present whenever an employee was charged with authority "responsibly to direct" other employees, even when that employee did not have authority to discipline others. *See* discussion *supra* at 23-25. If an employee, professional or otherwise, is charged with significant discretionary responsibility to ensure that the work of others is done properly and to report to management when it is not, the potential for conflicting loyalties is present. Faithful exercise of the power to "assign people to their work," to "see that they keep at their work and do it well," and to "correct them when they are at fault" requires undivided loyalty to management. *See Beasley v. Food Fair,* 416 U.S. at 660 (*quoting* H.R. Rep. No. 245, 80th Cong., 1st Sess. 16 (1947)). If nurses are permitted to align themselves with the aides they direct, it could "impair [their] loyalty" and diminish their willingness to report disciplinary and performance problems to manage-

ment. *Id.* at 660, 660-61; *see also Yeshiva,* 444 U.S. at 682 (conflict in loyalty needs to be prevented when employees "oversee[] other employees").[40]

The fact that a nurse may direct and evaluate the aides' work pursuant to "professional norms" does not reduce the potential for conflict. Work in many industries is governed by standards established by third parties. Skilled tradesmen, for example, must ensure that the employees they direct perform their work consistent with building codes, but the Board has never suggested that they are not acting "in the interest of the employer" when they enforce these standards, on the theory that there is no potential for divided loyalty.[41]

Further, the Court rejected this view of congressional policy in *Yeshiva.* This Court found that the congressional policy that "entitle[s]" an employer to the "undivided loyalty of its representatives," 444 U.S. at 682, extends to circumstances where an employee makes decisions based upon professional expertise. *Id.* at 688. In *Yeshiva,* the Board argued—just as it does here—that there was no "danger of divided loyalty" because the university expected its faculty to "pursue professional values rather than institutional interests." *Id.* at 684. The Court nevertheless found that the Board's approach would "undermine the goal" of ensuring that "employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union." *Id.* at 687-88. The Court emphasized that an employer

[40] The problem is not solved by putting nurses in a separate bargaining unit. Indeed, Congress specifically rejected that contention when defining supervisors. *See* Federal Labor Relations Act of 1947, S. Rep. No. 105, 80th Cong., 1st Sess. 9 (1947) (reporting the Committee's conclusion that "there is [no] such thing as a really independent foreman organization").

[41] *See, e.g., United Elec. and Mechanical, Inc.,* 279 NLRB 208, 212 (1986); *Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347 at 394 n.3 (1st Cir. 1980) (shift operating personnel who had to comply with numerous federal regulations in directing the operation of a nuclear power plant were determined to be supervisors).



must rely upon its managers and supervisors to "fulfill their professional mission by ensuring that the [employer's] objectives are met" without the risk of divided loyalty that arises when that employee is permitted to engage in collective activity. *Id.* at 688, 689-90. Under the rationale adopted in *Yeshiva,* the potential for divided loyalty exists whenever nurses engage in activities designated as supervisory under 29 U.S.C. 152(11). That is how Congress sought to identify employees with divided loyalties, and there is no need for the Board to create a different test out of whole cloth.

2. The Board further insists that failure to adopt its rule will nullify the congressional policy of extending the Act's coverage to "professionals." Pet. Br. at 12, 27.[42] By stating that the Court should "limit the supervisory exception as applied to professionals," the Board impliedly concedes that its rule is inconsistent with the statutory language. *Id.* at 12. This case, of course, does not involve employees who are "professionals" under the Act, so the Board's rule either does not apply here, or must be read as a request to "limit the supervisory exception as applied to [health care workers]."

This Court recognized in *Yeshiva* that "[t]here may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training." 444 U.S. at 686. The Court declined, however, to resolve that tension through adoption of the Board's "independent professional judgment" rule. Instead, the Court analyzed the facts as it

[42] In *Northcrest Nursing Home,* 313 NLRB No. 54 (1993), the Board asserts that all nurses will be supervisors if the Sixth Circuit's view in this case is upheld. This assertion is belied by the Board's own decisions issued prior to 1974. Before 1974, the Board generally applied the Act in accordance with the interpretation applied by the court of appeals in this case. *Id.* at 1 n.12. And under that rule, the Board did not find that all nurses were supervisors. *Compare Diversified Health Servs., Inc.,* 180 NLRB 461 (1969) (supervisory status not found) *with Garrard Convalescent Home, Inc.,* 199 NLRB 711, 717 (1972), discussed *supra* at n.37.

would for any other employee in any industry, even though the result in that case was to deny organizational rights to every single member of the Yeshiva faculty. The "controlling consideration" was the fact that the "faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." 444 U.S. at 686.

This Court acknowledged in *Yeshiva* that the Act should not be interpreted in a way that would "sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them." 444 U.S. at 690. But here, as in *Yeshiva*, the rule advanced by the Board is not necessary to prevent that result.[43] Application of the requirements set forth in the language of the statute clearly prevents the wholesale exclusion of nurses and professionals, because mere authority to "direct" the actions of another employee in the course of performing professional duties is not itself sufficient to make someone a "supervisor." The statute requires that a supervisor have authority "*responsibly* to direct" some "other employees" in a manner that is not "routine." 29 U.S.C. 152(11) (emphasis added). In determining whether an employee's authority to direct others meets this standard, the Board and the courts consider a variety of factors, including whether the employee is the most senior management representative on site,[44] the ratio of supervisors to employees,[45] and the extent of the employee's responsibility to correct deficiencies in other employees' performance and to report those deficiencies to management.[46]

The Court's opinion in *Yeshiva* should not be read, as petitioner suggests, to approve the rule advanced by the Board in this case. Its rule does not protect just those "employees whose decisionmaking is limited to the *routine* discharge of professional duties and projects to which they have been assigned," *Yeshiva*, 444 U.S. at 690 (emphasis added), but instead protects *all nurses except those who exercise the power to discipline or promote*.[47] Pet. Br. at 20.

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[43] Not all nurses direct the work of less skilled employees, using independent judgment. Indeed, floor nurses in hospitals may have little or no responsibility over subordinates. *See Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969); *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970). The Board itself has stated, "the duties and responsibilities given to licensed practical nurses vary considerably from one nursing home to another." National Labor Relations Board, *Thirty-Eighth Annual Report* at 65 (1973); *Park Manor Care Center, Inc.*, 305 NLRB No. 35 (1991). These differences highlight the need for a case by case determination.

[44] It has been observed that being the highest ranking employee at the facility is "[p]erhaps the most significant factor, often noted both in the decisions of the Courts and the Board" in determining supervisory status under the Act. *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062 (4th Cir. 1982). *See also American Diversified Foods, Inc.*, 640 F.2d 893, 896 (7th Cir. 1981); *Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 706 (8th Cir. 1992); *Autumn Leaf Lodge*, 193 NLRB 638, 639 (1971); *Pine Manor Nursing Center*, 270 NLRB No. 145 (1984); *Wright Memorial Hosp.*, 255 NLRB 1319 (1981); *Northcrest Nursing Home*, 313 NLRB No. 54 at 9-10 (1993).

[45] The ratio of supervisory to non-supervisory employees is a "guiding light" in determining supervisory status. *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 132 (7th Cir. 1989); *see also Waverly-Cedar Falls Health Care Center, Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991); *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307, 1312 (7th Cir. 1983); *Southern Indiana Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 885 (7th Cir. 1981); *James E. Matthews & Co. v. NLRB*, 354 F.2d 432, 435 (8th Cir.), *cert. denied* 384 U.S. 1002 (1966); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1080 (6th Cir. 1987); *see also Northcrest Nursing Home*, 313 NLRB No. 54 at 9-10 (1993).

[46] *See, e.g., Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949); *NLRB v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir. 1960), *see also* cases cited *infra* at n.55.

[47] The Court further suggested that professional employees may only be supervisors "if their activities fall outside the scope of . . . duties routinely performed by similarly situated professionals." 444 U.S. at 690. At least since its decision in *Beverly*, however, the Board has refused to find that nurses are supervisors even when the employer vests them with authority well beyond that inherent in their occupational status, as it did in this case. *See, e.g., Phelps Community Medical Center*, 295 NLRB 486 (1989); *Richland Manor*, 303 NLRB No. 20 (1991), *enf'd denied*, 970 F.2d 1548 (6th Cir.

*Yeshiva* suggests no such per se rule for professionals,[48] or for the health care industry.[49] This Court should accordingly find that the policies of the Act can be implemented by applying the same statutory criteria to all

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1992). Authority to assign aides to residents, to authorize work breaks, to report disciplinary problems, to adjust aides' complaints and to serve as the senior person in charge of 50 residents in a nursing home, is certainly not inherent in an employee's status as a nurse. The General Counsel in fact never sought to prove that these staff nurses did not exercise "any duties" beyond those "routinely performed" by nurses, 444 U.S. at 690, and the record refutes any such contention. *See* 3-9, *supra*. Petitioner's reliance on *Yeshiva* is accordingly misplaced.

[48] The cases cited by *Yeshiva* (444 U.S. at 690 n.30) in dicta as examples of an appropriate interpretation of the Act are analogous to decisions in nonprofessional contexts where employers are determined not to be supervisors because the direction they give is routine, infrequent, or sporadic. *See, e.g., NLRB v. Swift*, 292 F.2d 561, 563 (1st Cir. 1961); National Labor Relations Board, *Twenty-Sixth Annual Report* at 63 (1961). *See, General Dynamics Corp.*, 213 NLRB 851 (1974) (project leaders who direct other team members until the project is completed and then become rank-and-file employees are not supervisors); *Wurster, Bernardi & Emmons, Inc.*, 192 NLRB 1049 (1971) (architects who variously act as job captains or in other capacities for a particular job and who may give and receive direction from similarly situated professionals are not supervisors); *Skidmore, Owing & Merrill*, 192 NLRB 920 (1971) (same); *National Broadcasting Co.*, 160 NLRB 1440 (1966) (newsmen who rotate serving as deskmen and thus at different times direct each other are not supervisors).

[49] Petitioner relies heavily upon *Yeshiva*'s citation (444 U.S. at 690 n.30) of the Board's decision in *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950, 951-52 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973) and its seeming approval (in dicta) of what it perceived to be the Board's approach in the "health-care context." *Id.* In *Modesto*, the Board rejected the employer's contention that all of the registered nurses in a hospital were supervisors. *Sherewood Entrprises, Inc.*, 175 NLRB 354 (1969), however, was a companion case in which the Board recognized that a number of the nurses in the same hospital *were* supervisors. The functions performed by the floor head nurses in *Sherewood* are almost identical to the functions performed by HCR's staff nurses.



employees alleged to be supervisors—just as Congress directed in the plain language of the statute.[50]

## II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT RESPONDENT'S STAFF NURSES ARE SUPERVISORS UNDER THE ACT

Petitioner asks this Court to find that respondent's staff nurses "do not possess supervisory authority under the Board's test." Pet. Br. at 31. Because that test "rest[s] on erroneous legal foundations," the Board's order in this case cannot be upheld. *Lechmere*, 112 S. Ct. at 849 (*quoting NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).[51] Applying the correct test, the court of appeals found that respondent's staff nurses are "indeed supervisors within the definition of Section 2(11)."[52] The record provides "no reason to reject this conclusion." *Yeshiva*, 444 U.S. at 691 (declining to disturb court of

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[50] Otherwise, acceptance of the Board's position "could result in the indiscriminate recharacterization as covered employees of professions working in supervisory and managerial capacities." *Yeshiva*, 444 U.S. at 688.

[51] Petitioner in fact does not ask this Court to uphold its order under any other interpretation of the statute. *See supra* n.25. And this Court cannot enforce the agency's decision by substituting what it considers to be a more adequate or proper basis. *See SEC v. Chenery Corp.*, 318 U.S. 80, 85 (1943).

[52] Even if this Court were to find that the Board's rule correctly interpreted "the interest of the employer," it should nevertheless affirm the decision of the court of appeals. Petitioner asserts that employees do not act in the "interest of the employer" when they exercise "professional" judgment, but the licensed practical nurses in this case are not "professionals," and there is no finding that they exercised professional judgment within the meaning of § 2(12). In point of fact, based upon extensive hearings, the Board has concluded that the duties of most LPNs in nursing homes are more similar to aides than RNs. *Park Manor Care Center, Inc.*, 305 NLRB No. 135 (1991). In addition, the nurses' responsibilities over the aides in this case did extend beyond matters incidental to patient care. *See* n.47, *supra*, and discussion at 4-9.

appeals' factual conclusions where contrary Board decision appeared to rest upon "conclusory rationales.")

1. The record establishes that HCR vests its staff nurses with authority "in the interest of the employer" to perform a variety of functions that are categorized as "supervisory" under Section 2(11), 29 U.S.C. 152(11), and that those functions are exercised with "independent judgment." The court of appeals based its decision on the authority of the staff nurses to "assign" and "responsibly to direct" the aides.[53] As the court of appeals found, the evidence on this issue is "clear," because these nurses in fact have authority to "direct[] the operation of the aides" and "the entire nursing home." Pet. App. 10a.

The staff nurses are responsible for assigning work to the aides, adjusting work loads depending upon the amount of staff present, transferring aides from one wing to another, scheduling breaks and lunch periods, requesting and approving overtime, signing time cards, allowing employees to leave early, and replacing aides who call in sick. *See* discussion, *supra,* at 5-6. The aides report directly to these nurses and follow their orders. Pet. App. 48a. The ALJ acknowledged that these nurses are required to "oversee the work of the aides," Pet. App. 36a, and that it is their responsibility to "criticize an aide for improperly performing a task." *Id.* at 40a. Moreover, the ALJ found that the nurses "routinely report problems about an aide's work or attendance to Heartland's administrator" and that the reports that they made would "[s]ometimes . . . have major consequences for an aide—as in the aide being fired or being advised that any further occurrence will result in discharge." *Id.* at 44a.

The record also shows that respondent's staff nurses are "in charge of a wing" for their entire shift. Pet. App. 48a. They are the "senior personnel" present on site

[53] The Court did not consider or resolve the other bases for finding supervisory status under this section. See n.21, *supra.*



during 75% of the facility's operating hours.[54] *Id.* at 46a. And if they are not supervisors, it would mean that respondent has structured its operations with a 30:1 ratio of employees to supervisors—an untenable conclusion. Pet. App. 47a. As the ALJ acknowledged, under "common parlance" (Pet. App. 48a), HCR's nurses are supervisors.

2. In *Yeshiva,* this Court found that the Board's order permitting the university's faculty to organize could not be upheld because a "straightforward application" of the statutory criteria applied in other industries required a contrary conclusion. 444 U.S. at 683. The same is true here. It is clear from the findings of the ALJ, and the Board's position before this Court, that respondent's nurses were denied supervisory status based solely upon the view that they did not possess the power to hire, discipline, or promote subordinate employees. Pet. App. 40a, 43a, 44a, 45a, 49a. But that is not a statutory prerequisite, and the court of appeals correctly determined that the staff nurses' authority to assign and responsibly direct met the statutory criteria when applied in the "straightforward" fashion used for other industries.[55] *Yeshiva,* 444 U.S. at

[54] Although the ALJ acknowledged that two staff nurses are in charge of the facility and its 100 residents 75% of the time, he said that "it certainly does not compel the conclusion that the nurses are supervisors" since the nurses can call the DON. Pet. App. 47a. It is, however, compelling evidence that the nurses have authority "responsibly to direct". *See* cases cited *supra* n.44, 45. The Board should not be permitted to ignore record evidence (*see Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951)), or the reality that HCR, "like most every business, has an established hierarchial structure," and that it is "standard procedure" for lower level supervisors to seek direction and keep superiors informed. *Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347, 363 (1st Cir. 1980); *see also, NLRB v. McCullough Envtl. Servs.,* 144 LRRM 2627, 2640-41 (5th Cir. 1993).

[55] *See Ohio Power Company, Inc. v. NLRB,* 176 F.2d 385 (6th Cir.), *cert. denied,* 338 U.S. 899 (1949); *American Diversified Foods, Inc. v. NLRB,* 640 F.2d 893 (7th Cir. 1981); *NLRB v. Pilot*

683. Any doubt about this conclusion is put to rest by the Board's decisions in *University Nursing Home, Inc.*, 168 NLRB 263 (1967), and *Avon Convalescent Center*, 200 NLRB 702, 706 (1972). *See* discussion *supra* at 35-37. In these decisions—which were issued when the Board was still applying the statutory criteria instead of its special "patient care" rule—the Board determined that nurses vested with no more authority than HCR's nurses were in fact supervisors.[56]

3. There can also be no question that the court of appeals correctly concluded that the policies of the Act would be undermined if HCR's staff nurses were not found to be supervisors. HCR's nursing home and its 100 residents are regularly left under the sole control of two staff nurses. HCR must accordingly vest those nurses with supervisory authority and rely upon them to exercise it. HCR requires the undivided loyalty of these nurses to ensure the quality, efficiency, and profitability of its facility.

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*Freight Carriers, Inc.*, 558 F.2d 205, 109 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978); *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195 (7th Cir. 1977), *cert. denied*, 434 U.S. 827 (1978); *Fredericks Foodland, Inc.*, 247 NLRB No. 38 (1980); *Colorflo Decorator Products, Inc.*, 228 NLRB 408, 410 (1977).

[56] There is accordingly no basis to conclude, as petitioner suggests (Pet. Br. at 29-30), that these nurses only perform the functions of minor supervisors, such as straw bosses, who do not meet the statutory requirements. *See, e.g., Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991); *Colorflo Decorator Products*, 228 NLRB 408, 411 (1977); *Commercial Motors, Inc.*, 240 NLRB 288, 289 (1979); *United Elec. & Mechanical, Inc.*, 279 NLRB 208 (1986); *see also Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972).



## CONCLUSION

For the reasons set forth, respondent respectfully requests this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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DECEMBER 1993

(13)



No. 92-1964

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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## REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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Respondent's central claim is that the Board's approach to determining whether a nurse is a supervisor is contrary to the text of the National Labor Relations Act. Br. 19, 22, 30. According to respondent, "[t]he Board claims that nurses act 'in the interest of the employer' only if they exercise 'personnel authority' that can 'affect the aides' job status or pay.'" Br. 19; see *id.* at 23, 25, 43, 47. In respondent's view, that interpretation violates the statute's plain language because having "personnel authority" (a term not found in the statute) is not a prerequisite to having the authority, in the words of Section 2(11), "responsibly to direct" employees "in the interest of the employer." 29 U.S.C. 152(11).

Respondent's contention rests on an inaccurate statement of the Board's position and on a misreading of the

statutory text. The Board does not require a showing of "personnel authority" in order to conclude that a nurse is a supervisor. Rather, the Board's test focuses on the statutory criteria: whether the employee has any of the 12 listed forms of authority in Section 2(11); whether the employee's exercise of that authority requires the use of "independent judgment" rather than being merely "routine"; and whether the authority is exercised "in the interest of the employer." *Northcrest Nursing Home*, 313 N.L.R.B. No. 54 (Nov. 26, 1993), slip op. 3. In applying those criteria to nurses, the Board considers both the need to reconcile the Act's exclusion of supervisors with its inclusion of professionals, Pet. Br. 26-27, and Congress's intention that the supervisor exclusion not reach down to employees who, although having the authority to direct the work of others, lack genuine management prerogatives, *id.* at 14 & n.5.

As a result, the Board's test is that when nurses' direction of aides is designed to provide "sound patient care," "derive[s] from the * * * nurses' professional or technical status," and takes place "primarily in the interest of the patient" rather than in the employer's managerial interests, the nurses' conduct is not "responsibl[e] * * * direct[ion]" of employees "in the interest of the employer." *Northcrest*, slip op. 3-4. The Board's construction is consistent with the statute and is a rational way to implement its goals.[1]

[1] In addition to mischaracterizing the Board's position, respondent mistates the issue raised by the record in this case. Respondent frames (Br. 21) the issue presented as "whether nurses who use independent judgment to 'assign' and 'responsibly to direct' aides are exercising authority 'in the interest of the employer.'" As to assignment, however, the Administrative Law Judge (ALJ), whose findings were adopted by the Board, found that the nurses' responsibilities "fall well short of 'requir[ing] the use of independent judgment,' as that expression is used in Section 2(11)." Pet. App. 40a. The nurses' assignment responsibilities therefore fail to meet a threshold requirement for being supervisory, without regard to whether they were exercised "in the interest of the employer." As to direction, the ALJ found that, to the extent the nurses had responsibilities to direct the aides, those responsibilities did not amount to "'responsibly . . . direct[ing]' the aides 'in the interest of the employer.'" *Ibid.* To overturn that finding, respondent must show both that the direction in this case rose to the level of "responsibl[e] * * * direct[ion]" *and* that it was undertaken "in the interest of the employer."



A. *The text of the statute.* Respondent's position is that the Board has read the words "responsibly to direct" out of the statute by interpreting the phrase "in the interest of the employer" to require some supervisory authority to regulate hiring, firing, or discipline.[2] That is not the Board's interpretation; responsible direction can indeed provide a basis for concluding that a nurse is a supervisor.[3] Responsible direction in the interest of the employer, however, does not exist simply because an employee has discretionary authority to direct the work of other employees.

[2] Resp. Br. 25 ("Under the Board's view, responsible direction could never constitute a basis for supervisory status in the absence of authority to perform functions listed in the other clauses of the section.").

[3] A nurse would be deemed a supervisor for having the authority "responsibly to direct" aides *if* the nurse's power were more than that customarily exercised by virtue of that person's professional or technical training or experience. The facts here are instructive. While the nurses oversee the aides in the performance of their daily tasks, they do not establish job descriptions or "specific job duties"; the director of nursing establishes the elements of the job the aides are to perform and the days and shifts the aides work. J.A. 6, 25-26. While respondent suggests that the Board's view is that a nurse's authority *must* affect "job status or pay of aides" to make her a supervisor, Resp. Br. 22, citing Pet. Br. 20, our brief stated that those forms of authority are illustrations of supervisory conduct. See Pet. Br. 20 ("[T]he Board draws a distinction between a nurse's direction of aides that is incidental to the delivery of patient care, * * * and the [nurse's] possession of authority over personnel, *such as* the authority to affect the job status or pay of aides.") (emphasis added).

1. As respondent notes (Br. 24), the phrase "responsibly to direct" was added to the statute to indicate that a supervisor need not have hiring, firing, or disciplinary authority. Congress, however, did not intend that phrase to encompass all acts of direction. When Congress, in response to this Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), amended the definition of employee to exclude supervisors, see Pet. Br. 13-14, it distinguished between minor supervisory direction, such as that exercised by skilled craftsmen, and direction that entails more significant managerial responsibility. In discussing the Senate bill, the Senate Committee Report observed that, "[i]n framing this definition [of supervisor,] the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be truly supervisory."[4] S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). The Report also explained what it meant by "truly supervisory" personnel:

> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. Rep. No. 105, *supra*, at 4. The Committee indicated that its test conformed to that applied by the Board in making bargaining unit determinations.[5] *Ibid.*

[4] The Senate bill contained all of the supervisory functions contained in the provision as enacted except the function "responsibly to direct." S. 1126, 80th Cong., 1st Sess. § 2(11) (1947), quoted in *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 182 n.14 (1981).

[5] The Board consistently included craftsmen who directed the work of helpers, and minor supervisors such as leadmen, in bargaining units of rank-and-file workers. See, *e.g.*, *Endicott Johnson Corp.*, 67 N.L.R.B. 1342 (1946); *Richards Chemical Works*, 65 N.L.R.B. 14 (1945); *Pittsburgh Equitable Meter Co.*, 61 N.L.R.B. 880 (1945). Supervisors with managerial authority, however, were excluded from "bargaining units comprising their subordinates." NLRB Tenth Annual Report 34 (1946).



When the bill reached the Senate floor, Senator Flanders proposed that the definition of "supervisor" be amended to include the phrase "responsibly to direct." He explained that the amendment would apply to persons "*above* the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees' as enumerated in the [Senate Committee] report," when those persons, while lacking the authority to make "effective" changes in the status of subordinate employees, nevertheless exercised significant managerial authority. 93 Cong. Rec. 4677-4678 (1947) (emphasis added). Senator Taft, the sponsor of the Senate bill, immediately accepted the amendment, because in his view it made no significant change in the definition of supervisor in the bill. *Id.* at 4678. The amendment then passed the Senate without further debate.[6] *Ibid.*

The supervisor exception thus covers responsible direction that reflects managerial authority, not minor supervision that flows, for example, from an employee's greater skill or experience than that of other employees. In a variety of industrial settings, the Board and the courts have construed the phrase "responsibly to direct" to reflect that distinction.[7] The Board applies the same prin-

[6] The Conference Committee accepted the Senate version of the supervisor exception. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 182-183. Senator Taft, in reporting that action to the Senate, stated that the "Senate Amendment, which the conference ultimately adopted, is limited to bona fide supervisors * * * to individuals generally regarded as foremen and employees of like or higher rank." 93 Cong. Rec. 6442 (1947).

[7] See *Southern Bleachery & Print Works, Inc.*, 115 N.L.R.B. 787, 791 (1956) (machine printers "exercised an authority which the average rank-and-file employee does not possess," but were not

ciple in the health care field: a nurse's direction of aides incidental to patient care does not, by itself, place the nurse in the ranks of management. As the Board explained in *Northcrest Nursing Home*, slip op. 3, 4-5:

> Charge nurses exercise responsibilities in assigning work and directing employees in order to provide sound patient care. These responsibilities derive from the charge nurses' professional or technical status.[8]
>
> * * * *
>
> Charge nurses in hospitals and nursing homes are, in our experience, on a par with "leadmen" in other industries; the kinds of assignments and direction they give to nurses aides and other employees are analogous to those given by "leadmen" outside the health care industry. * * *

supervisors, because it "is not the authority responsibly to direct other employees *which flows from management and tends to identify or associate a worker with management*" but rather "derives from their working skill and from their responsibility for the operation of a complex machine which requires a 7-year apprenticeship to achieve") (emphasis added), enforced, 257 F.2d 235, 239 (4th Cir. 1958) (relevant inquiry is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees, or is a supervisor who shares the power of management"), cert. denied, 359 U.S. 911 (1959); *Ross Porta-Plant, Inc.* v. *NLRB*, 404 F.2d 1180, 1182 (5th Cir. 1968) (requiring "the type of authority which flows from management and tends to associate an individual with management"); *NLRB* v. *Security Guard Service, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967) (requiring "[s]ome kinship to management, some empathic relationship between employer and employee * * * before the latter becomes a supervisor for the former").

[8] The term "charge nurse" is used "to refer to the nurse (RN or LPN) who is in charge of a wing of a hospital or nursing home during a particular shift. The charge nurse is 'responsible for seeing that the work is done, that medicines are administered to the patients, that the proper charts are kept, and that the patients receive whatever treatment has been prescribed.'" *Northcrest*, slip op. 1 n.3, quoting *Abingdon Nursing Center*, 189 N.L.R.B. 842, 850 (1971).



The Board therefore concluded that "[t]he patient care analysis merely incorporates these tenets [regarding leadmen] in the health care setting." *Id.* at 4 n.13; see also *NLRB* v. *Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973) (relying on the "leadman" and "straw boss" analogy in upholding the Board's finding that the nurses in that case were not statutory supervisors).

2. Respondent also errs in its main contention—that the Board's construction of the phrase "in the interest of the employer" conflicts with the text of the Act. Br. 22-23, 26-27, 30. The Board's rule is that when a nurse's direction of other employees stems from professional or technical training, incidental to the treatment of patients, it does not amount to direction "in the interest of the employer." Pet. Br. 16-20. In respondent's view, however, the only function of the phrase "in the interest of the employer" is to denote concepts of respondeat superior and to prevent a union official who adjusts grievances from being deemed a supervisor. Br. 16, 27-28. Respondent's approach is irreconcilable with the structure of the statute.

First, such a reading would effectively override the Act's coverage of professionals. Professional employees necessarily engage in varied, nonroutine work that involves "the consistent exercise of discretion and judgment in its performance," 29 U.S.C. 152(12). They also, virtually always, give direction to some less-skilled personnel whose labors are required for the professional to carry out his assignments. Pet. Br. 26-27. The Act expressly contemplates such supervision by stating that the term "professional" also includes apprentice professionals who are working under the "supervision" of other professionals. 29 U.S.C. 152(12)(b); see H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947) (professional employees include "such persons as legal, engineering, scientific and medical personnel together with their junior professional assistants").

If professionals were deemed statutory supervisors simply by having authority to tell a junior employee what to do, it would frustrate Congress's intention to apply the Act to them. Supervision within the scope of Section 2(11) therefore requires something more. That does not imply, as respondent suggests, Br. 26, that the Act requires a special rule for professionals; rather, it means only that the protection extended to professional employees must be taken into account in tailoring the coverage of Section 2(11) for all employees.[9] See AFL-CIO Amicus Br. 11-12 & n.7.

Second, respondent's interpretation of the phrase "in the interest of the employer" would make it essentially superfluous. Because all employees are required to act in a way that furthers the employer's business interests, it is difficult to imagine any employee's actions in his role as an employee that would not constitute actions "in the interest of the employer" in that sense. Pet. Br. 25. A reading that turns a statutory phrase into surplusage is strongly disfavored.[10] *Pennsylvania Public Welfare Dep't* v. *Davenport*, 495 U.S. 552, 562 (1990).

[9] The Board therefore applies the same test of supervisory status to licensed practical nurses as it does to registered nurses although the former are technical, rather than professional, employees. Licensed practical nurses are frequently used, as here, interchangeably with registered nurses. And, while technical employees "do not meet the strict requirements of the term 'professional employee' as defined in the Act * * * [their] work * * * involv[es] the use of independent judgment and requir[es] the exercise of specialized training usually acquired in colleges or technical schools or through special courses." *Barnert Memorial Hospital Center*, 217 N.L.R.B. 775, 777 (1975).

[10] Respondent suggests (Br. 28) that the phrase "in the interest of the employer" has meaning under its view because it would prevent union stewards from being deemed supervisors when they adjust grievances. That suggestion fails to explain why the phrase was applied to all of Section 2(11), not just the portion dealing with grievances. And the observation (Resp. Br. 28 n.31) that the phrase serves to exclude "acts undertaken by an employee in his



The Board's approach, in contrast, focuses on whether an employee's authority threatens the conflicting loyalties that the supervisor exclusion was designed to avoid. When nurses direct aides to serve the goal of delivering health care to a patient, they are not primarily advancing management's labor relations interests, and "are not forced to choose between the interests of the employer and those of the other employees, because the two sets of interests will rarely diverge." *Northcrest*, slip op. 3. Accordingly, the Board explained that, "in the health care field, as in other industries, the authority on the part of more skilled and experienced employees to assign and direct other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status * * *."[11] *Id.* at 4.

B. *Decisions of this Court.* This Court's decisions support, rather than undercut (see Resp. Br. 27-30), the Board's interpretation of the phrase "in the interest of the employer." In *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947), the employer argued that foremen were not protected employees under the Act, because the definition of "employer" in former Section 2(2) of the Act, 49 Stat. 450, included persons who acted "in the interest of the employer." In the employer's view, that

personal capacity as an owner of property" is far afield from the industrial settings that were Congress's primary concern. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 679-680 (1980).

[11] Amicus American Health Care Association argues (Br. 21 n.17) that management must have the undivided loyalty of nurses who have authority "to compel employees to satisfy the work standards established by the employer." If by "compel," however, amicus means the ability to coerce subordinates who fail to do their work correctly, by threat of discipline or other adverse action, the nurse wielding such power is a supervisor under the Board's rule. If, in contrast, by "compel" amicus simply means authority to report performance problems to management, or to tell a subordinate to redo a task correctly, the nurse is the kind of minor supervisor who is not excluded from coverage of the Act. See pp. 4-6, *supra*.

phrase "reads foremen out of the employee class and into the class of employers." 330 U.S. at 488. The Court rejected that claim, finding that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest." *Ibid.* The Court concluded that the phrase "in the interest of the employer" represented "an adaptation of the ancient maxim of the common law, *respondeat superior*," and thus was intended "to render employers responsible in labor practices for acts of any persons performed in their interests." *Id.* at 489.

Respondent states (Br. 28) that the *Packard* majority's interpretation "should control here as well," because Congress used the words "in the interest of the employer" in the definition of supervisor in Section 2(11) and it is "doubtful that Congress would have chosen these precise words if it did not intend for them to be construed according to the Court's interpretation in *Packard*." That contention has matters backwards. In enacting Section 2(11), Congress's purpose was to reject the *Packard* opinion. Instead, Congress adopted the viewpoint of Justice Douglas's dissent, which argued that Congress had not intended to accord organizational rights to foremen. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279 (1974) (noting that "[i]n view of the subsequent legislative reversal of the *Packard* decision, the dissenting opinion * * * is especially pertinent"). In Justice Douglas's view, the phrase "acting in the interest of the employer" referred solely to employees "who acted for management not only in formulating but also in executing its labor policies." 330 U.S. at 496 (dissenting opinion).

Because Section 2(11) was framed to overturn the result in *Packard* and to endorse the dissenters' position, it is highly unlikely that Congress utilized the phrase "in the interest of the employer" to connote the "very loose test"[12]

[12] Resp. Br. 27, quoting *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 217 (1979).



espoused by the *Packard* majority. See S. Rep. No. 105, *supra*, at 4. Rather, the much more natural inference is that Congress accepted Justice Douglas's interpretation of the phrase "acting in the interest of the employer," and intended that phrase to connote the execution by supervisors of management's labor relations policies.

The inference that Congress endorsed Justice Douglas's view is also supported by the background of Section 2(11). In 1946, a year before the Court's decision in *Packard*, Congress had considered and passed the Case Bill, which President Truman vetoed.[13] 92 Cong. Rec. 6674-6678 (1946). The Case Bill, among other things, sought to reverse the Board's decision in *Packard*, 64 N.L.R.B. 1212 (1945). Senator Ellender sponsored an amendment to the Case Bill that defined "supervisor" under the Act as "any individual having authority, in the interest of the employer" to take certain specified actions respecting employees under his or her supervision.[14] See H.R. 4908, 79th Cong., 2d Sess. § 9(b) (1946); 92 Cong. Rec. 5698 (1946). In explaining the definition of "supervisor" to the House, Representative Case stated that " 'in the interest of the employer' " was "the key phrase to keep in mind" because it was intended to draw "a line of distinc-

[13] This Court has recognized the relevance of the Case Bill as a precursor to the 1947 amendments. See *Florida Power & Light Co.* v. *International Bhd. of Elec. Workers, Local 641*, 417 U.S. 790, 811 n.20 (1974).

[14] Senator Ellender, who was to play an important role in the passage of Section 2(11) the following year, see 93 Cong. Rec. 4136-4137 (1947), explained that the purpose of his amendment was to "explicitly set[] forth the intent of Congress to exclude persons vested with bona fide supervisory authority" from coverage of the Act, but not to exclude thereby "working foremen, leadmen, straw bosses, and other employees with negligible supervisory duties." 92 Cong. Rec. 5698 (1946). In describing Section 2(11) the next year, the Senate Committee Report said that its language was "patterned after that contained in the Ellender amendment to last year's Case bill." S. Rep. No. 105, *supra*, at 19.

tion * * * between the employee who was purely an employee and the employee who was a representative of management." He added:

> [I]f *"in the interest of the employer,"* this person has a primary responsibility in hiring, firing, discharging, and fixing pay, and things of that sort, then at the bargaining table he shall not sit on the side of the employee, but shall sit on the side of the employer.

92 Cong. Rec. 5930 (1946) (emphasis added).

Representative Case's view prevailed with the enactment of Section 2(11), and the Board's interpretation of "in the interest of the employer" in Section 2(11) accords with Representative Case's explanation of that language in the Case Bill. It also accords with Justice Douglas's dissent in *Packard,* which carried the day in Congress. By treating the implementation of management policy regarding labor as the factor that makes supervisory conduct "in the interest of the employer," the Board's test conforms to congressional intent.

Contrary to respondent's contention (Br. 29-30), *NLRB* v. *Yeshiva University,* 444 U.S. 672 (1980), does not require a more expansive meaning of the phrase "in the interest of the employer." In *Yeshiva,* the Court rejected the Board's contention that faculty members who were intimately involved in making the educational policy of a university were not "managerial" employees because, in the Board's view, their exercise of professional judgment was in their own, not their employer's, interest. *Id.* at 686-690. Respondent argues (Br. 29-30) that *Yeshiva* concluded that a professional necessarily acts "in the interest of the employer" within the meaning of Section 2(11) when directing others, even as an incident to his professional responsibilities.

*Yeshiva,* however, disavowed any suggestion that the Court was "sweep[ing] all professionals outside the Act"; it noted with approval that "[t]he Board has recognized



that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." 444 U.S. at 690. The Court explicitly recognized that one professional on a team of employees can have the "authority to direct and evaluate team members," without forfeiting his status as a protected employee. *Id.* at 690 n.30. The Court also viewed its holding to be consistent with the Board's test in the health care field of asking "in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Ibid.* Those statements make clear that the Court's rationale in *Yeshiva* leaves ample room for the Board's "patient care" analysis in considering whether a nurse is engaged in supervision "in the interest of the employer."

C. *The 1974 Health Care Amendments.* The process surrounding Congress's enactment of the 1974 Health Care Amendments reconfirms the validity of the Board's interpretation of the supervisor exception. Pet. Br. 18-19, 28 & n.15. As this Court stated in *Yeshiva,* in 1974 Congress "expressly approved" the Board's approach to determining supervisory status in the health care field. 444 U.S. at 690 n.30. Despite this, respondent suggests (Br. 30-37) that the Board's interpretation of Section 2(11) derives no support from the 1974 amendments.

1. In enacting the National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395, which brought private nonprofit hospitals under the Act, both the Senate and House Committees rejected a proposal to exclude health care professionals from the definition of supervisor, finding that the proposed amendment was unnecessary in light "of existing Board decisions," which the Board was expected to follow:

> [T]he Board has carefully avoided applying the definition of "supervisor" to a health care professional

> who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974); see also H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974) (same).

Respondent contends (Br. 32-33) that those clear expressions of congressional intent by both committees responsible for drafting the legislation should be ignored under the principle that legislative history that is not linked to the enactment of statutory language is not entitled to significant weight. That principle applies when a party invokes legislative history to show that Congress *changed* an existing administrative interpretation.[15] It does not apply, however, where, as here, Congress took note of the prior administrative interpretation and deliberately left it intact. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 284 & n.13 (1974). As the Court has noted, when Congress "has refused to alter the administrative construction," that construction should be given particularly great weight. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. at 177, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see Pet. Br. 22 & n.11.

[15] That was the situation in *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1545-1546 (1991). There, the Committee reports stated that the Board should give due consideration to avoiding undue proliferation in determining bargaining units in the health care field. The hospitals argued that, even though Congress had not amended Section 9(b) of the Act, 29 U.S.C. 159(b), Congress nonetheless intended to change the Board's traditional criteria for determining bargaining units in the health care context. The Court held that the reports were "best understood" as notice to the Board that if the Board did not give "appropriate consideration * * * Congress might respond with a legislative remedy." 111 S. Ct. at 1545. In this case, Congress endorsed the Board's existing practices, and has not repudiated the Board's continuation of them.



2. Respondent also argues (Br. 35-37) that the Board's present rule is different from the one that the Board had been applying in the health care field before enactment of the Health Care Amendments in 1974. Respondent asserts that, if Congress endorsed Board practices prior to 1974, it did not sanction the Board's current rule.

There is no doubt that the Committee reports understood the Board's rule to incorporate the "patient care" test that the Board applies today. Those reports explain that proposals to amend the supervisor exclusion were rejected because legislators were satisfied that the patient care test would adequately protect health care professionals. See pp. 13-14, *supra*. That test had been articulated in a recent Board decision, see *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950 (1970), enforced, 489 F.2d 772 (9th Cir. 1973), and an administration official testified that the Board "had not generally deemed registered nurses to be supervisors, although they direct the work of nonprofessional or less skilled people."[16] Even if some pre-1974 Board decisions had taken a different approach, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *GSA*, 425 U.S. 820, 828 (1976).

In addition, the Board's cases prior to 1974 do reflect the principle that when registered nurses direct other, less-skilled employees with respect to work to be performed for patients, the nurses are not supervisors because their "authority in this regard [is] solely a product of their highly developed professional skills and do[es] not, with-

[16] See *Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 427 (1973) (statement of Richard S. Schubert, Undersecretary of Labor).

out more, constitute an exercise of supervisory authority in the interest of their [e]mployer." *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. at 951. Between 1970 and 1974, the Board, in most cases, resolved claims of supervisory status in the health care field consistently with *Doctors' Hospital.*[17] As respondent notes (Br. 36 & n.37), in *Rockville Nursing Center,* 193 N.L.R.B. 959 (1971), and *Avon Convalescent Center, Inc.*, 200 N.L.R.B. 702 (1972), the Board concluded that certain nurses were supervisors based solely upon their authority to direct the work of their aides. Those decisions may have been a source of concern to the health care professionals who urged amendment of Section 2(11). With the exception of these two cases, however, the post-*Doctors' Hospital* decisions cited by respondent are consistent with *Doctors' Hospital.*[18]

[17] See, *e.g.*, *Madeira Nursing Center, Inc.*, 203 N.L.R.B. 323, 324 (1973) (registered and licensed practical nurses were not supervisors when the assignments and directions they gave to aides and orderlies were "either in accord with the scheduling done by the director of nursing or dictated by the needs of the patients"); *Garrard Convalescent Home, Inc.*, 199 N.L.R.B. 711, 717 (1972) (licensed practical nurse in charge of a shift was a supervisor where she had authority to hire and discharge subordinates, and to send home employees who failed to do their assigned tasks); *Rosewood, Inc.*, 185 N.L.R.B. 193, 194 (1970) (licensed practical nurses in a nursing home were supervisors where, in addition to "supervis[ing] the work of two to six employees including nurses' assistants, nurses' aides, and orderlies," they had authority "to recommend wage increases, enforce the [e]mployer's rules, discipline employees * * * effectively recommend hiring and in emergency situations may discharge employees"); *National Living Centers, Inc.*, 193 N.L.R.B. 638, 639 (1971) (licensed vocational nurse was a supervisor, where, in addition to "assign[ing] certain duties to the three or four nurses' aides on her shift," she had "authority to * * * grant time off, and * * * effectively recommends discharges and transfers to other shifts").

[18] See Resp. Br. 36 n.37, citing *Garrard Convalescent Home, supra* (discussed at note 17, *supra*); *New Fairview Convalescent Home*, 206 N.L.R.B. 688, 749 (1973) (registered nurse was a supervisor where she changed workdays of subordinates, assigned, re-



The Board's action in overruling *Rockville* and *Avon* in *Northcrest Nursing Home,* slip op. 4 n.12, does not indicate that those cases "severely undermine [the Board's] interpretation" (Resp. Br. 27); rather, it underscores that they are aberrations in the line of decisions applying *Doctors' Hospital.* Far from suggesting that the "patient care" analysis departs from pre-1974 practice, the Board's decision in *Northcrest* examined the evolution of its cases, from *Doctor's Hospital* through its approval by Congress in 1974, *Northcrest,* slip. op. 2-3, and clarified the application of its patient care analysis. The Board's holding that it will consider "whether the alleged supervisory conduct of * * * nurses is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer," *id.* at 3, reflects the mainstream of its pre- and post-1974 decisions.

D. *The nurses in this case.* Because the Board's test is a reasoned product of administrative discretion, accords with the statute, and has been approved by Congress, it governs the supervisory issue in this case. Under the Board's test, respondent's nurses are not supervisors. Respondent gives the impression (Br. 46) that its staff nurses are primarily engaged in supervising the work of the aides. In fact, as the ALJ found, Pet. App. 36a-37a, the nurses spend the bulk of their time on matters dealing directly with patient care: checking for changes in residents' health; administering medicine, procedures, and emergency treatment; calling physicians; and accompanying and assisting them on rounds.[19] The nurses also bathe,

assigned, and transferred employees, adjusted employee grievances, and prepared evaluations of nurses' aides); *Sherewood Enterprises, Inc.*, 175 N.L.R.B. 354 (1969) (prior proceeding in the same case as *Doctors' Hospital,* which is consistent with that decision, see Pet. Br. 17-18). *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967) (Resp. Br. 35), was the Board's first opportunity to consider the application of Section 2(11) in the nursing home context, and predated *Doctors' Hospital.*

[19] Among the nurses' duties are the performance of enemas, catherizations, lavaging, gavaging, suctions, inhalation therapy,

feed and dress residents when aides are not available. Pet. App. 36a; J.A. 122-123. The nurses' role with respect to the aides is incidental to those primary functions.

1. The nurses spend "a small fraction of their time" directing the work of the aides. Pet. App. 36a-37a. Respondent asserts (Br. 3 & n.4, 46-47) that, apart from the nurses, only the Director of Nursing (DON) and not the Assistant Director of Nursing (ADON) actively supervises the aides; therefore, if the nurses are not supervisors, the DON is the sole supervisor of the aides. The ALJ did not so find, and the testimony of an aide cited by respondent reflects that she considered both the DON and ADON to be her supervisor.[20] J.A. 52. Moreover, the record shows that the ADON made the work assignments for the day shift aides until March 9, 1989, Tr. 980; see also note 1, *supra* (nurses' assignment function was routine), and passed on the nurses' evaluations of aides. Tr. 912. If the nurses had a problem, they called either the DON or the ADON. J.A. 4; Tr. 1054. The record therefore does not support the inference (Resp. Br. 48) that respondent had no effective means of supervising its employees if the nurses are not viewed as supervisors.

2. Contrary to respondent's suggestion (Br. 6-7), the nurses do not impose or effectively recommend discipline. See Pet. App. 44a-45a; J.A. 10-15, 24, 28-29, 94; Tr. 101-103, 1000-1001. Respondent's assertion (Br. 6 n.9) that nurses are "authorized to terminate aides for abusing residents" is based on an "assumption" by Nurse Clore, from her prior experience at other nursing homes, and not upon any authorization from respondent.[21] Tr.

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I.V.s, changing dressings and colostomy and drainage bags; giving massages and exercise; and care for the dead and dying. J.A. 123.

[20] The testimony of the nurses cited by respondent, Tr. 42, 154, does not discuss the role of the ADON.

[21] The nurses' actual lack of authority over discipline is illustrated by an incident in which a nurse had to call the DON before



1294-1295. The ALJ concluded that the nurses "do not penalize any aide or threaten any aide with future penalties. And with only minor exception[s] the nurses do not recommend that any aide be penalized." Pet. App. 44a.

While nurses do deal with aides' grievances in the course of directing their work, they essentially "document" the problem so that if it continues the DON can handle it. Tr. 81-82. It is the DON that decides on a course of action that the nurses may implement.[22] Tr. 244, 433-434. Before February 1989, the nurses had no role in written evaluations of the aides. Pet. App. 45a. Thereafter, the nurses sporadically filled out parts of the evaluation forms, but were instructed "*not* to answer the forms' ultimate questions—about 'overall evaluations' and whether or not to 'recommend continued employment.'" *Ibid.*; J.A. 21, 40. The nurses do not participate in the meeting between the DON and the aides to discuss the evaluations. Pet. App. 45a; J.A. 21, 83, 88-89, 91-93. Those constraints are at odds with respondent's view that the nurses exercise true supervisory control.

3. Based on his assessment of the record evidence, the ALJ, upheld by the Board, properly found that the nurses were primarily care givers with minor supervisory responsibilities. The nurses' direction of the work of the aides does not amount to "'responsibly . . . direct[ing]' the aides 'in the interest of the employer,'" but, rather, "is closely akin to the kind of directing done by leadmen or straw bosses, persons who Congress plainly considered to be 'employees.'" Pet. App. 40a.

* * * *

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sending home an aide who was cursing her and brandishing a baseball bat. Tr. 100-103, 326-327.

[22] While the nurses can give the aides written counseling forms, they have no authority to give out warning notices used by respondent. J.A. 80-81, 108-109, 118.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Board's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*National Labor Relations Board*

JANUARY 1994

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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**No. 92-1964**

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

To: The Honorable Chief Justice,
and Justices of the United States Supreme Court,

## MOTION FOR LEAVE TO FILE AMICUS BRIEF ONE DAY LATE

U. S. Home Care Corporation, by its counsel, respectfully requests leave to file its amicus brief in the above-captioned proceeding one day late. In support, the following is respectfully submitted.

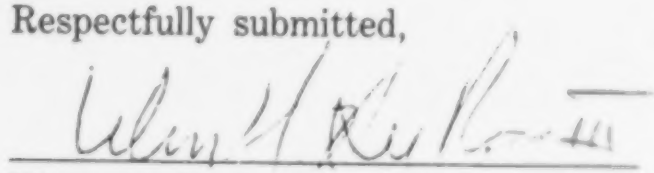
1. Undersigned counsel received, from its printer, a preliminary draft of its amicus brief on December 14, 1993. However, due to internal problems in counsel's office, he was unable to return the amicus brief to the printer so as to receive it back for filing in a timely manner. In this regard, equipment failures in counsel's office as well as a personal emergency of counsel's secretary made it impossible for counsel to return the amicus brief to the printer in a timely manner. To avoid any possible prejudice to any party, by the late filing of this amicus brief, it is being hand

delivered to the Petitioner on the same date as if it had been timely filed, and it will be sent by Federal Express to the respondent and all amicus curiae.

2. Respondent has consented to the grant of the instant Motion, and Petitioner has authorized the undesigned to state that it would interpose no objection to a grant of this Motion.

3. In view of the foregoing, it is urged that the Court accept and consider U. S. Home Care Corporation's amicus brief.

Respectfully submitted,



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December 15, 1993

No. 92-1964

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF AMERICAN NURSES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE
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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF OF AMERICAN NURSES ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

### CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

### INTEREST OF THE AMICUS CURIAE

The American Nurses Association ("ANA"), a national labor organization and federation of registered nurses, consists of 53 state and territorial constituent organizations with over 200,000 members. The question before this Court is whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judg-

ment and incidental to patient care does not make a nurse a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11).

The answer to this question will directly affect the registered nurse members of ANA who oversee the work of less-skilled employees. ANA testified before the 80th Congress in support of the 1947 Taft-Hartley Amendment which extended the coverage of the Act to professionals such as registered nurses. Moreover, it was ANA's testimony in support of the 1974 Health Care Amendments to the Act that led to Congress' express approval of the Board test which is at issue here.[1] If the court of appeals' decision stands, almost all of the registered nurses presently represented by ANA's constituent organizations will be at risk of losing the protection of the Act.

## SUMMARY OF ARGUMENT[2]

The court of appeals, relying on its prior decisions in *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992), and *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987), held that nurses who, in the exercise of their professional judgment in the treatment of patients, direct nurses aides in their delivery of health care, thereby act "in the interests of the employer" within the meaning of § 2(11) of the Act. The court below reached this conclusion because, in its view, it is "self-evidently in the best interest of the employer to try to do a superior job of serving the needs and interests of the employer's customers." *Beverly California Corp.*, 970 F.2d at 1553.

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[1] In this case, the Board applied the rule to licensed practical nurses, but the test applies with even more force to registered nurses who, unlike licensed practical nurses, are professionals under the Act. *See NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983); *Doctors' Hosp. of Modesto, Inc.*, 183 NLRB 950, 951 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973); *Presbyterian Medical Ctr.*, 218 NLRB 1266, 1267 (1975).

[2] To avoid duplication, we leave it to the Petitioner National Labor Relations Board, whose position in this matter we fully support, to state the case for the Court.



Such a reading of Section 2(11) "would swallow up and displace almost the entirety of the professional-employee inclusion" (*NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 185 (1981)) as regards nurses in the health care industry. The court of appeals professed to find support for its conclusion in the Act's text and legislative history. It erred on both scores. In 1947, Congress was at pains to exclude from the coverage of the Act only those individuals who were "truly supervisory," and to extend the Act's protections to professionals like registered nurses whose work "involv[ed] the consistent exercise of discretion and judgment in its performance," and whose "special problems" and "interest in maintaining certain professional standards" could be addressed in collective bargaining.

In hearings before both the 92nd and 93rd Congress, ANA representatives urged Congress to insure that a distinction be drawn between a registered nurse's direction of other employees in the exercise of professional judgment incidental to the nurse's treatment of patients, and the exercise of supervisory authority in the interest of the employer within the meaning of Section 2(11) of the Act. In specific response to ANA's concerns, both branches of Congress noted in their respective Reports on the 1974 Health Care Amendments that existing NLRB decisions made that very distinction, and that Congress "expects the Board to continue evaluating the facts of each case in this manner when making its determinations" regarding the supervisory status of registered nurses in the health care industry. It is this very Board test (which, as this Court has held, "Congress expressly approved in 1974" (*NLRB v. Yeshiva Univ.*, 444 U.S. 672, 690 & n.30 [(1980)])) that the decision below rejects.

Affirmance of the Sixth Circuit's holding that supervision exercised in accordance with professional, rather than business norms is § 2(11) supervision, would deny the protections of the Act to virtually all registered nurses who work in hospitals and other health care facilities, contrary to the intent of the 80th Congress in enacting

§ 2(12), and the intent of the 93rd Congress which passed the 1974 Health Care Amendments. The overwhelming majority of registered nurses today give professional direction to nurses aides and other nursing personnel. Under professional standards, state regulations and canons of ethics, registered nurses give such direction and do so properly. Indeed, such direction is at the core of that practice and without it, a registered nurse cannot fully function as a professional. In short, the decision of the Sixth Circuit, unless reversed by this Court, would frustrate Congress' goal of extending the protection of the Act to registered nurses in the health care industry so as to "ameliorate [their working] conditions and elevate the standard of patient care." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 497-98 (1978).

## ARGUMENT

### INTRODUCTION

This case presents the question whether the test, fashioned and consistently applied by the Board in the health care industry to resolve the tensions between the overlapping directives of §§ 2(11) and 2(12) of the National Labor Relations Act ("the Act"), has a "reasonable basis in law" and should be affirmed. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). In Part I, we demonstrate that the Board's accommodation of the competing Sections 2(11) and 2(12) policies is consonant with, if not compelled by, the Act and its legislative history, and this Court's precedent. In Part II, we establish that the reasoning of the court of appeals would deny nurses the full panoply of rights afforded them by the Act and, if followed, would have a substantial impact on registered nurses, whose licensure and professional standards incorporate the direction of the work of less-skilled employees incidental to the nurses' treatment of patients.



## I. THE DECISION BELOW CONFLICTS WITH THE ACT, ITS LEGISLATIVE HISTORY AND THIS COURT'S PRECEDENT

### A. The Board's Test Is Firmly Rooted In The Text And Legislative History Of The Act

#### 1. *The 1947 Taft-Hartley Section 2(11) and 2(12) Amendments*

In defining the term "supervisor" in § 2(11), the 1947 Congress "exercised great care, desiring that the employees [t]herein excluded from the coverage of the act be truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess. 19 (1947).[3] As regards the "professional" definition in Section 2(12), Congress in 1947 was again "careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and *nurses*." *Id.* (emphasis supplied).[4] Congress expressly

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[3] Section 2(11) of the Act, 29 U.S.C. § 152(11), defines a "supervisor" as any person:

> having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[4] Section 2(12) of the Act, 29 U.S.C. § 152(12), provides that the term "professional employee" means:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an

singled out professionals for coverage by the Act in part because,

> [a]lthough there has been a trend in recent years for manufacturing corporations to employ many professional persons, including architects, engineers, scientists, lawyers, and nurses, no corresponding recognition was given by Congress to their special problems. Nevertheless such employees have a great community of interest in maintaining certain professional standards.

*Id.* at 11.

### 2. *The 1974 Health Care Amendments* [5]

In the course of drafting the 1974 Health Care Amendments, the 93rd Congress considered suggestions from a number of labor organizations representing health care professionals that the § 2(11) "supervisor" definition be modified, so as either to exclude health care professionals from its reach, or to make it plain that the exercise of professional responsibilities was not "supervision" within the meaning of that Section.

These suggestions echoed those made in the 92nd Congress in connection with the House's consideration of H.R. 11357, which would also have extended coverage of the Act to nonprofit hospitals.[6] ANA testified before the

apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

[5] Health Care Amendments Act of 1974, Pub. L. No. 93-360, 88 Stat. 395 (1974).

[6] The House passed H.R. 11357 in August 1972, and forwarded it to the Senate, which intended to hold brief hearings on the bill



House Special Subcommittee on Labor of the Committee on Education and Labor in support of H.R. 11357.[7] In its testimony, ANA addressed the issue of "supervision" in the context of the professional duties of a registered nurse:

> A professional must utilize his unique skill and education within the bureaucratic structure in which he finds himself. In yesterday's world the registered nurse both developed the nursing care plan for a patient and completely carried it out. In today's health care facilities, most notably in hospitals, a number of subprofessional categories carry some of the functions involved in the care of the patient. Thus the exigencies of the modern system of the delivery of health care place the registered nurse to a certain extent in a coordinating, directing and teaching role as well as one of administering direct care. The complexity of the system requires a certain pyramiding of nurse positions to handle the various aspects of this role.

H.R. 11357 Hearings at 59.

This complexity is a function of the mix of bureaucratic and professional authority structures in health care facilities:

and obtain prompt floor action. During the Senate hearings, Senator Taft raised a number of concerns and, due to the lateness in the Session, the Senate took no further action on the House-passed bill during the 92nd Congress. An identical bill (again co-sponsored by Representatives Thompson and Ashbrook) was introduced in the House in the 93rd Congress. The 1974 Health Care Amendments were a legislative compromise among this bill and two Senate bills introduced by Senators Cranston and Javits, and Senator Taft, respectively. *See Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 93d Cong., 2d Sess. 105-12, 270, 290, 457-65 (1974) (hereinafter cited as "*1974 Legislative History*").

[7] *Extension of NLRA to Nonprofit Hospital Employees: Hearings on H.R. 11357 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st and 2d Sess. 45, 49-64 (1972) (hereinafter cited as "H.R. 11357 Hearings") (statement of ANA officials Muriel A. Poulin and Alice L. Ahmuty).

> Most businesses are organized along bureaucratic lines: there is an hierarchic authority structure in which persons in the top-ranked positions have authority to direct the activities of those below them. In contrast, the professional model is characterized by autonomy and self-determination: * * *
>
> * * * *
>
> This organizational model mixing two authority systems has proved perfectly valid. However, it is not the model with which labor boards customarily deal, nor is it the model upon which regulations developed for bureaucratically structured industry can be successfully imposed without accommodation. This organizational context for nursing influences the relationship of the nurse to everyone else in the health care facility—to the physician, to other nurses, to subprofessionals and to the employer.

*Id.* at 60-61.

With respect to the application of the Section 2(11) definition of "supervisor" to the professional registered nurse, ANA official Poulin noted:

> A professional nurse, by definition of most State laws of registration, is a supervisor of the practice of a group of people, so that in nursing, for example, we have clinical supervision, which would be any professional nurse such as myself, working with a group of people responsible for your care.
>
> I am actually the professional person, you see, responsible for all your care, but I may have 10 people working with me. I am, in fact, a clinical supervisor of the area. I am not an administrative supervisor. I do not hire and fire these 10 people. If one of the 10 people is unsatisfactory and I am responsible for your care, I am going to do everything I can to make sure she doesn't work for my patients.
>
> So there is a distinction between supervision in professions and areas that are not professional.

*Id.* at 67.



In her prepared Statement on H.R. 11357 to the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare,[8] ANA official Munger elaborated on the distinction between § 2(11) "supervision" and the exercise of professional responsibilities:

> Almost all nurses exercise independent judgment and *professional authority* to direct other employees. Few, however, possess the "bureaucratic" authority envisioned in the NLRA definition of "supervisor"—to effectively recommend hiring, firing, promotion and discharge. In nursing, the term "supervisor" should be limited to those registered nurses who truly and substantially possess and exercise such authority over other registered nurses. In present-day hospitals, such true supervisors are typically limited to the director of nursing and her immediate assistants and associates.
>
> Whatever transitory or limited authority nurses have over other employees *is often not "supervisory," but rather a manifestation of their professional role in the nursing care of patients.* A registered nurse who leads subprofessional employees should not be considered a supervisor any more than a physician should be considered a supervisor because nurses respond to his directions, or an attorney should be considered a supervisor because a secretarial staff is available to work with him.[9]

For that reason,

> Whatever the rules for determining the supervisory status of non-professionals, *great caution must be*

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[8] As noted above, the Senate also held hearings on the House-passed H.R. 11357.

[9] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1972: Hearings on H.R. 11357 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 11, 13, 15-16 (1972) (emphasis added) (hereinafter cited as "Senate Hearings on H.R. 11357") (statement of Mary Munger, R.N., Vice Chairman, ANA Commission on Economic and General Welfare).

*exercised in applying those rules to professionals in order to avoid confusing the requisite judgment and discretion of professionals with the directional responsibilities of supervisors and thereby depriving the former of rights Congress intended they have.* While registered nurses in the exercise of their professional responsibilities give direction and assistance to other nursing personnel such as LPN's and aides, they do not exercise true supervisory responsibilities. *Registered nurses must exercise independent judgment in making decisions in regard to patient care but only routine and minimal authority with respect to personnel matters.* The fact that, as professionals, they routinely lead the work of less skilled employees does not make them supervisors within the Act. *It is important that the responsibility of registered nurses to exercise independent judgment in supervising patient care not be confused with the question of personnel supervision under the Act.* By law, patient care supervision is a principal duty of the registered nurse.

Senate Hearings on H.R. 11357 at 17-18 (emphasis supplied).

ANA representatives took the same position in the hearings in the House and Senate on the 1974 Health Care Amendments to the Act. In her prepared Statement submitted to the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, ANA official Bonnie Graczyk stressed the difference between registered nurses' professional direction and § 2(11) supervision:

> The problem arises out of a strict interpretation of the term "supervisor" as defined in Section 2(11) of the NLRA, when applied to the work of a professional nurse. The term as originally defined was intended for application to the business or industrial setting, where a supervisor exercises a considerable amount of authority to control and direct the work of others. This is not true for the work of nurses, or for that matter, the work of all professional em-



> ployees. *Every nurse while practicing her profession exercises her own independent judgment. Legally, every nurse is responsible for her own acts. Even a doctor's order cannot immunize the nurse from such responsibility or from suit by an injured patient.* The nurse supervisor may advise and assist other nurses in their practice, but she cannot "direct" their practice. In view of this, any mechanistic interpretation of the term "supervisor" as is normally relevant and valid in business or industrial parlance *would result in the exclusion of a large number of practicing nurses from the coverage of NLRA.*
>
> The health team providing the actual care to patients within the unit may consist of several types of personnel—the nursing aide, the practical nurse and the registered nurse. The registered nurse, as the professional member of this group, provides the direction for care of the patient. * * * The nurse utilizes professional judgment in providing direct care to patients and in evaluating whether good and adequate patient care is being given by others, whether medical directives are being carried out appropriately and whether records are adequately maintained within the unit so that continuity of patient care can go on despite the shifts in personnel.[10]

ANA official Hargett's testimony in the House paralelled Ms. Graczyk's Senate testimony:

> By law, patient care supervision is a principal duty of the registered nurse. By legal definition of nursing practice in State's nursing practice acts, the registered nurse is required to assume responsibility for exercising independent judgment and discretion in relation to patient care needs.

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[10] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973: Hearings on S. 794 and S. 2292 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 110, 120-21 (1973) (emphasis added) (statement of Bonnie P. Graczyk, R.N., Member, ANA Commission on Economic and General Welfare).

> It would make no sense, and would defy Congress' expressed intention, that registered nurses were to be accorded rights as professionals under the act, to hold that the fact of patient care supervision, which goes toward the registered nurse's professional status, also has the effect of making her a supervisor under the act.[11]

ANA official Alice L. Ahmuty, who accompanied Mr. Hargett before the House Special Subcommittee, was directed to the following statement in the House Report on H.R. 11357 (the bill which passed the House in the prior Congress) with respect to the § 2(11) issue:

> Testimony was also taken from most of the unions which represent hospital employees. They uniformly supported H.R. 11357, although the American Nurses Association urged the subcommittee to consider a special problem faced by nurses. The ANA urged that industrial concepts of "supervisor" not be carried over into the hospital industry, possibly leading to the exclusion of head nurses or charge nurses from bargaining units. These nurses are presently included in bargaining units in some States. Your committee's intent in extending NLRA coverage to nonprofit hospitals is that nurses as well as all other hospital employees enjoy the rights guaranteed to other employees covered by the act, and it is your committee's view that nurses with only nominal supervisory duties should not be considered as "supervisors" within the meaning of the National Labor Relations Act.

H.R. Rep. No. 1252, 92d Cong., 2d Sess. 5 (1972). The following colloquy then took place between Ms.

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[11] *Extension of NLRA to Nonprofit Hospital Employees: Hearings on H.R. 1236 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 22-23 (1973) (hereinafter cited as "Hearings on H.R. 1236") (statement of Charles E. Hargett, R.N., Member, ANA Commission on Economic and General Welfare).



Ahmuty and Representatives Ashbrook and Thompson (the co-sponsors):

> MR. ASHBROOK. I have several questions. Do you think the statement in the report [on H.R. 11357] was sufficient for legislative history? Does it cover the particular problem of your relationship to the normal concepts of "supervisor"? Do you think specific language should be incorporated in the legislation?
>
> MISS AHMUTY. I would be more strongly in favor of having some specific modification of the term "supervisor" in the act as it relates specifically to registered nurses. That would be our most favored position. However, we recognize this does sometimes pose problems.
>
> MR. ASHBROOK. Those are my only questions.
>
> MR. THOMPSON. *We attempted*—and you state it in your statement—*in the report last year to deal with this problem.*
>
> *In devising the report this year we shall attempt to strengthen that language.* One major difficulty is in drafting language to include in such a bill. The second is in making legislative history, which we can do in the report and in colloquy on the floor, which would have the effect of calling the Board's attention, in the likely event this becomes law, to that particular situation.
>
> I talked with the new solicitor of the Board, who was formerly minority counsel to this committee and is a very able man. I also talked to members of the Board, and they would anticipate that even absent specific statutory language with a strong legislative history, they would be able to handle this supervisor problem. They are quite aware of it.

Hearings on H.R. 1236 at 23-24 (emphasis added).

True to Chairman Thompson's promise that the legislative history of the 1974 Health Care Amendments on this

point would be "strengthen[ed]," the House and Senate Reports both contained the following statement:

SUPERVISORS

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". *The Committee has studied this definition with particular reference to health care professionals, such as registered nurses,* interns, residents, fellows, and salaried physicians *and concludes that the proposed amendment is unnecessary because of existing Board decisions.* The Committee notes that *the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.*
>
> *The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations.*

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974), and H.R. Rep. No. 1051, 93d Cong., 2d Sess. 7 (1974), *reprinted in 1974 Legislative History* at 13 & 275, respectively (emphasis added).

**B. Both Congress And This Court Have Approved The Board's Longstanding Interpretation Of The Act**

As this Court observed in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the "existing Board decisions," to which the above Congressional Reports referred, recognized that:

> employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded



> from coverage even if union membership arguably may involve some divided loyalty.[30]

[30] For this reason, architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. See *General Dynamics Corp.*, 213 N.L.R.B., at 857-858; *Wurster, Bernardi & Emmons, Inc.*, 192 N.L.R.B. 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920, 921 (1971). See also *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 951-952 (1970), enf'd, 489 F.2d 772 (CA9 1973) (nurses); *National Broadcasting Co.*, 160 N.L.R.B. 1440, 1441 (1966) (broadcast newswriters).

*Id.* at 690 & n.30. And, "[i]n the health-care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients, *a test Congress expressly approved in 1974*. S. Rep. No. 93-766, p. 6 (1974)." *Yeshiva*, 444 U.S. at 690 n.30 (emphasis added). Accordingly,

> [o]nly if an employee's activities fall *outside the scope of the duties routinely performed by similarly situated professionals* will he be found aligned with management.

*Id.* at 690 (emphasis added). In view of this explicit Congressional approval, this Court found that these Board decisions, including the *Doctors' Hospital of Modesto* decision on registered nurses, "accurately capture[d] the intent of Congress." *Id.*

In *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970), *enf'd*, 489 F.2d 772 (9th Cir. 1973), the Board held:

> the Employer's registered nurses are a highly trained group of professionals who normally inform other, lesser skilled, employees as to the work to be performed for patients and insure that such work is done. *But, their daily on-the-job duties and authority in this regard are solely a product of their highly*

> *developed professional skills and do not, without more, constitute an exercise of supervisory authority in the interest of their Employer.*

*Id.* at 951 (emphasis added). The Board's test in *Doctors' Hospital of Modesto* was routinely and uniformly applied in registered nurse cases prior to the passage of the 1974 Amendments. *See, e.g., Sherewood Enters., Inc.*, 175 NLRB 354 (1969). And, not surprisingly in view of the legislative history recounted above, this test has likewise been consistently utilized by the Board in cases decided subsequent to the 1974 Amendments. Indeed, in the first decisions involving registered nurses the Board issued subsequent to the 1974 Amendments, the Board specifically adverted to that legislative history as confirmation of the correctness of its approach. *See Wing Memorial Hosp. Ass'n*, 217 NLRB 1015 (1975); *Sutter Community Hosps. of Sacramento, Inc.*, 227 NLRB 181, 192 (1976).

The court below simply ignored this legislative history and, as Judge Posner observed in *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989), overlooked the "most important point" in this case, namely that "nurses are professionals and their exercise of supervision is guided by professional training and norms." For that reason,

> [s]upervision exercised in accordance with professional rather than business norms is not supervision within the meaning of the supervisor provision, for no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives.

*Id.*

The Sixth Circuit's erroneous conclusion flowed from its failure to harmonize § 2(11) with § 2(12). Judge Posner is also instructive on this point:

> Although section 2(11)—at least its first part, up to "if"—appears to define "supervisor" broadly, the



appearance is deceptive. *Supervision in the elementary sense of directing another's work is excluded*; a supervisor under the statute must have authority over another's job tenure and other conditions of employment. *This distinction is important because the Act allows professionals—doctors, teachers, etc.—to bargain collectively, yet most professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on.* See *NLRB v. Yeshiva University*, 444 U.S. 672, 690 n. 30 * * * (1980). The distinction between supervision in the statutory sense and work direction by a professional is mentioned with approval in the legislative history of the 1974 Health Care Act Amendments, which put nonprofit health care institutions under the National Labor Relations Act though without amending section 2(11).

*NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) (emphasis added; citations omitted); *see also Children's Habilitation Center*, 887 F.2d at 131 (Section 2(11) is a "term of art" since the statutory definition "allows an employee to do some supervision without thereby becoming a supervisor under the Act. This frequently happens when the employee is a professional acting in accordance with professional norms. Examples are a lawyer directing paralegals and a registered nurse directing nurse's aides."): *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 816 (2d Cir. 1980) (NLRB's test "represents an attempt by the Board to resolve the tension between the 'overlapping directives' of § 2(12) * * * and § 2(11)").

In contrast to the Sixth Circuit, which paid no heed to the critical distinction Congress drew "between supervision in the statutory sense and work direction by a professional" (*Res-Care*, 705 F.2d at 1465), the Board's test rests upon it. As we have shown, the NLRB has

routinely followed this rule, and this Court "cannot ignore this consistent, longstanding interpretation of the NLRA by the Board." *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-90 (1981). Indeed, such an unvarying construction of the Act by the agency charged with its execution " 'should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction.' " *Id.* at 177 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). Here, it is clear that Congress "intended to leave the Board's historic practice" of distinguishing between professional and supervisory responsibilities "undisturbed." *Id.* at 185. Given Congress' "acceptance of that practice" (*id.* at 190), and this Court's recognition that the NLRB's rule "accurately capture[s] the intent of Congress" (*Yeshiva*, 444 U.S. at 690), the Board's test should be affirmed as "rational and consistent" with the Act. *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987).

## II. THE RATIONALE OF THE COURT OF APPEALS WOULD EXCLUDE THE MAJORITY OF REGISTERED NURSES FROM THE PROTECTION OF THE ACT, CONTRARY TO THE INTENT OF SECTION 2(12) AND THE 1974 HEALTH CARE AMENDMENTS

### A. Congress Enacted § 2(12) And The Health Care Amendments Specifically To Allow Registered Nurses To Bargain Collectively And To Improve Patient Care

As shown in Part I above, Congress added § 2(12) to the Act expressly to extend the statute's protections to professionals such as registered nurses, in recognition of their "special problems" and "great community of interest in maintaining certain professional standards." The 1974 Health Care Amendments were likewise designed to improve the working conditions of registered nurses in nonprofit hospitals by allowing them to bargain collectively:



> The elimination of the nonprofit-hospital exemption reflected Congress' judgment that hospital care would be improved by extending the protection of the Act to nonprofit health-care employees. Congress found that wages were low and working conditions poor in the health-care industry, and that as a result, employee morale was low and employment turnover high. Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and elevate the standard of patient care.

*Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 497-98 (1978) (footnotes omitted).

Events subsequent to the passage of the 1974 Amendments have confirmed Congress' judgment that allowing registered nurses in nonprofit hospitals to bargain collectively would help alleviate the chronic nursing shortage, ameliorate nurses' working conditions and improve patient care. In its exhaustive rulemaking proceeding on bargaining units in the health care industry (*see generally American Hosp. Ass'n v. NLRB*, —— U.S. ——, 111 S. Ct. 1539 (1991)), the Board found that:

> It is common knowledge, and the record substantiated, that currently there is an unprecedented and severe nursing shortage. Some hospitals have delegated some traditional RN functions, not reserved to RNs by law, to employees with no RN training. Additionally, hospitals currently have more seriously ill patients (higher acuity) than historically reported. Less qualified nurses, and fewer nurses, will be forced to attend to more seriously ill patients, leading to a lower level of care and more stress for the remaining RNs who may then opt out of nursing.
>
> Nurses testified that they view collective bargaining, in their own unit, as the vehicle for improve-

> ment in their working conditions and for allowing them a voice in patient care. Additionally, hospitals are trying innovative proposals for nurses: opening contracts for them alone, raising wages, setting weekend differentials.

Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,916 (1988) (citations omitted).[12]

### B. Under The Court Of Appeals' Approach, Most Registered Nurses Would Be Deprived Of Rights Guaranteed Them By The Act

In this Part, we demonstrate that the Sixth Circuit's analysis applies to all registered nurses (who comprise the overwhelming majority of professionals in hospitals), because the duties the court of appeals found "supervisory" are performed by nurses under their professional norms and state nursing regulations. As a consequence, acceptance of the Sixth Circuit's view would sweep registered nurses "outside the Act in derogation of Congress' expressed intent to protect them" in § 2(12) (*Yeshiva*, 444 U.S. at 690), so as to improve their working conditions and "elevate the standard of patient care" through collective bargaining. *Beth Israel*, 437 U.S. at 497-98.

#### 1. *The court of appeals' decision would have widespread impact in the industry*

The number of registered nurses in health care facilities, the rapid increase in the utilization of unlicensed

[12] *See also* Final Rule, 54 Fed. Reg. 16,336, 16,341 (1989), where the Board stated:

> On January 19, 1989, the Secretary of Health and Human Services made public the report of his Commission on Nursing. This Commission was an advisory panel appointed to examine reports of a widespread shortage of registered nurses, and to make recommendations for resolving the shortage. We have examined the Commission's Report and find that it supports our observations in NPR II concerning the nursing shortage, unique problems confronting nurses, and the special need of nurses for their wage compression to be alleviated.



nursing personnel and the nurse's duty as a professional to direct the nursing tasks of these employees, all combine to make the Sixth Circuit's decision momentous for the registered nurse. We address each of these points in turn below.

First, registered nurses not only comprise approximately 23% of a hospital's *entire* workforce, but as "the largest professional group in any hospital," may "outnumber other professionals by a ratio of 4 to 1 or more," and typically constitute *80%* of the professionals in a hospital. Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,914 (1988).

Second, in recent years there has been an exponential increase in the use by health care facilities of unlicensed nursing assistants to supplement their nursing staff.[13] This explosion is by no means over, and by the year 2000, there may be as many as 433,000 *new* jobs for nurses aides alone.[14] According to the American Hospital Association, approximately 97% of its member hospitals already employ nursing aides or nurse extenders.[15] In acute care hospitals, 82% of registered nurses work with unlicensed nurse extenders. And, in long term care facilities, such as nursing homes, 98% of nurses in such facilities are teamed with unlicensed nurse extenders.[16]

As the use of nursing aides has increased, their duties have expanded to include tasks which had historically

[13] Mary A. Blegen, *et al., Who Helps You With Your Work?*, 92(1) American Journal of Nursing 26 (January 1992).

[14] Susan C. Reinhard, *Jurisdictional Control: The Regulation of Nurses' Aides*, 9 Nursing & Health Care 373 (September 1988).

[15] Laura R. Merker, *et al., 1990 Utilization of Nurse Extenders*, American Hospital Association 3 (1991) ("AHA Study"). As this study reflects, the term "nurse extender" encompasses such positions as nurse assistant, porter/orderly, clerk/secretary, intern/nursing student, special technician and monitor technician. *Id.*

[16] Blegen, *supra* note 13, at 26-27.

been the province of the registered nurse. Thus, nursing assistants and aides may be delegated certain nursing tasks, such as the "(1) non-invasive and non-sterile treatments * * *; (2) the collecting, reporting, and documentation of data including, but not limited to: (A) vital signs, height, weight, intake and output * * *; (B) changes from baseline data established by the RN; * * * [and] (3) ambulation, positioning, and turning * * *."[17] Some assistants may also have the authority to "administer skin tests and * * * injections and to perform minor invasive procedures to withdraw blood."[18]

Third, since responsibility for total patient care rests with the registered nurse (*see* Section II.B.2 below), this nearly universal resort to nursing assistants and aides has led to equally widespread direction of these employees by registered nurses.[19] Registered nurses' direction of the work of these nursing aides and assistants in the exercise of professional judgment is incidental to their care of patients and a function of their professional responsibility. *See* Section II.B.2 below.

In light of the pervasive use of unlicensed nursing personnel in hospitals, the expanding range of these employees' duties and the registered nurses' professional obligation to direct their work in the interests of patient care, the court of appeals' rejection of the Board's rule would cast most registered nurses outside the shelter of the Act. Should that occur, nearly one-fourth of a hospital's entire workforce, and four-fifths of its professional employees, would be § 2(11) supervisors, a result which cannot be squared with the intent of either § 2(12) or the 1974 Health Care Amendments. *See Res-Care,*

[17] Texas Board of Nurse Examiners, Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel, § 218 (1992); *see also* Alaska Board of Nursing, Position Statement: Activities of Unlicensed Nursing Personnel (1987).

[18] Wash. Rev. Code § 18.135.010 (1991).

[19] AHA Study, *supra* note 15, at 6, 7.



705 F.2d at 1468 (if licensed practical nurses classified as supervisors, "almost one-third of the nursing home's staff would be barred from the protections of the Act").

***2. In finding nurses to be statutory supervisors with no rights under the Act, the court of appeals relied on the very duties of registered nurses that bring them within the Act's protections as professionals***

The Sixth Circuit failed to recognize that "no issue of divided loyalties is raised when supervision is required to conform to professional standards rather than to the company's profit-maximizing objectives." *Children's Habilitation Center,* 887 F.2d at 134. As we show next, because state regulation and the standards of the nursing profession include such supervision as an integral part of the practice of nursing, these activities fall within "the scope of the duties routinely performed by similarly situated professionals," and do not constitute Section 2(11) "supervision." *Yeshiva,* 444 U.S. at 690.

Most state nurse practice acts, and regulations and advisory opinions promulgated thereunder, "clearly identify the registered nurse as the individual charged with the ultimate responsibility for directing the provision of nursing care," including the care given by aides.[20] Thus, in Nebraska, "[t]he practice of nursing by a registered nurse shall mean assuming responsibility and accountability for nursing actions which include * * * supervising, delegating, and evaluating nursing activities." Neb. Rev. Stat. § 71-1,132.05 (1992). Similarly, in

[20] Susan M. Kennerly, *Implications of the Use of Unlicensed Personnel: A Nursing Perspective,* 16(5) Focus on Critical Care 364, 367 (October 1989).

Nurses "are required to follow * * * state nurse practice acts" which define and regulate nursing practice. Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33,900, 33,912 (1988). Authority to issue licenses, rules, regulations and advisory opinions under these acts rests with the state boards of nursing.

Indiana, a registered nurse "bears primary responsibility and accountability for nursing practices." Ind. Code Ann. § 25-23-1-1.1 (Burns 1992). And in Hawaii, the registered nurse "shall be accountable and responsible to the consumer for the quality of nursing care rendered." Haw. Rev. Stat. § 457-2 (1993); *see also* Mont. Code Ann. § 37-8-102 (1993) (same); R.I. Gen. Laws § 5-34-3 (1992) (same). Also, in Delaware, the "registered nurse * * * bears primary responsibility and accountability for nursing practices." Del. Code Ann. tit. 24, § 1902 (1992).[21]

This responsibility for the patient's total nursing care imposes an affirmative duty on the registered nurse to supervise or direct the nursing duties of nursing assistants. Indeed, the very definition of the nurse as a professional recognizes that the nurse's scope of practice "includes the teaching, direction, and supervision of less skilled person-

[21] *See also* Kentucky Board of Nursing, Advisory Opinion Statement: Roles of Nurses in the Supervision and Delegation of Nursing Acts to Unlicensed Personnel 3 (1992) ("When the registered nurse delegates selected nursing acts, the responsibility and accountability of total nursing care of an individual remains with the registered nurse."); Colorado State Board of Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 (1992) ("The professional nurse is responsible for and accountable * * * for the quality of nursing care he or she provides either directly or through the delegated care provided by others."); Texas Board of Nurse Examiners, Delegation of Selected Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel, § 218.1 (1992) ("The registered professional nurse (RN) is responsible for the nature and quality of all nursing care that a client receives under his/her direction."); Maine Board of Nursing, Regulations Relating to Delegation by Registered Professional Nurses of Selected Nursing Services to Licensed Practical Nurses and Unlicensed Personnel, Chapter 5(1)(A) (1983) ("The registered professional nurse is responsible for the nature and quality of all nursing care that a patient receives."); Michigan Board of Nursing, Rules Regarding Delegation, Rule 104.(2) (1989) ("The registered nurse shall bear ultimate responsibility for the performance of nursing acts, functions or tasks performed by the delegatee within the scope of the delegation.").



nel in the performance of delegated nursing activities." Mich. Comp. Laws § 333.17201 (1992); *see also* Kentucky Nurse Practice Act, Ky. Rev. Stat. Ann. § 314.011 (6)(d) (Baldwin 1993) ("Registered nursing practice" is "the performance of acts requiring substantial specialized knowledge, judgment, and nursing skill" including "[t]he supervision, teaching of, and delegation to other personnel in the performance of activities relating to nursing care."); Ohio Rev. Code Ann. § 4723.02(B)(6) (Baldwin 1993) ("Practice of nursing as a registered nurse" encompasses the provision of nursing care requiring "specialized knowledge, judgment, and skill," and specifically, the "[t]eaching, administering, supervising, delegating, and evaluating nursing practice.").[22]

State boards of nursing regulations are to the same effect. *See, e.g.*, Alaska Board of Nusing, Position Statement: Activities of Unlicensed Nursing Personnel (1987) ("delegation of some nursing tasks is a legally accepted part of nursing practice"); Marvland Board of Nursing, Declaratory Ruling 92-1 (1992) ("The Board of Nursing considers it within the scope of practice of a *licensed* nurse to delegate selected nursing tasks to unlicensed personnel * * *."); Colorado State Board of

[22] *See also* Alaska Stat. § 08.68.410 (1993); Ariz. Rev. Stat. Ann. § 32-1601 (1993); Colo. Rev. Stat. § 12-38-132 (1993); Del. Code Ann. tit. 24, § 1902 (1992); D.C. Code Ann. § 2-3301.2 (1993); Fla. Stat. ch. 464.003 (1992); Ga. Code Ann. § 43-26-3 (Michie 1993); Haw. Rev. Stat. § 457-2 (1993); Ind. Code Ann. § 25-23-1-1.1 (Burns 1992); Me. Rev. Stat. Ann. tit. 32, § 2102 (West 1992); Md. Code Ann., Health-Occ. § 8-101 (1993); Minn. Stat. § 148.171 (1992); Miss. Code Ann. § 73-15-5 (1991); Mo. Rev. Stat. § 335.016 (1992); Mont. Code Ann. § 37-8-102 (1993); Neb. Rev. Stat. § 71-1, 132.05 (1992); N.H. Rev. Stat. Ann. § 326-B:2 (1992); N.M. Stat. Ann. § 61-3-3 (Michie 1993); N.C. Gen. Stat. § 90-171.20 (1992); N.D. Cent. Code § 43-12.1-02 (1993); Okla. Stat. tit. 59, § 567.3a (1992); S.C. Code Ann. § 40-33-10 (Law. Co-op. 1991); S.D. Codified Laws Ann. § 36-9-3 (1993); Tex. Rev. Civ. Stat. Ann. art. 4518 (West 1993); Utah Code Ann. § 58-31-2 (1993); Vt. Stat. Ann. tit. 26, § 1572 (1992); Wash. Rev. Code § 18.88.030 (1991); Wis. Stat. § 441.11 (1991-1992); Wyo. Stat. § 33-21-120 (1993).

Nursing, Rules and Regulations Regarding the Delegation of Nursing Functions, Chapter XIII, Rule 2 ("Supervision of personnel associated with nursing functions is included in the legal definition of the practice of professional nursing."). Accordingly, a nurse's supervision in this regard:

> is exercised in accordance with a professional judgment as to the best interests of the patient rather than a managerial judgment as to the employer's best interests. It is no different from a doctor's telling his nurses which patients to provide what care to, which is not supervision under the statute.

*Res-Care*, 705 F.2d at 1468.

Moreover, "[b]ecause * * * unlicensed individuals * * * function in a contributory nursing role that requires their reporting directly to nurses in the practice setting * * *," the realities of a registered nurse's duties under the scope of professional nursing practice encompass the oversight and supervision of nursing assistants and aides.[23] This supervisory role in furtherance of patient care also holds the nurse "legally accountable for assessing the capabilities of licensed and unlicensed nursing personnel to assure that only those individuals who are truly qualified are delegated responsibility for carrying out specific aspects of nursing care."[24] Such professional evaluation assessments, of course, are not indicia of § 2(11) supervisory status, but are part of the nurse's "routine discharge of professional duties." *Yeshiva*, 444 U.S. at 690 & n.30.

The ANA Code for Nurses, which sets out the canon of ethics of professional nurses, also obliges nurses appropriately to direct the work of nursing assistants in furtherance of the nurses' proper care and treatment of their patients.[25] Thus, Section 6.4 of the Code provides:

[23] Kennerly, *supra* note 20, at 367.

[24] *Id.*

[25] American Nurses Association, Code for Nurses with Interpretive Statements (1985). This Code imposes upon nurses an affirmative duty to "live[] up to the highest ethics of [this] most noble profession." *Churchill v. Waters*, 977 F.2d 1114, 1124-25 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 2991 (1993).



> Inasmuch as the nurse is accountable for the quality of nursing care rendered to clients, nurses are accountable for the delegation of nursing care activities to other health workers. Therefore, the nurse must assess individual competency in assigning selected components of nursing care to other nursing service personnel. The nurse should not delegate to any member of the nursing team a function for which that person is not prepared or qualified. Employer policies or directives do not relieve the nurse of accountability for making judgments about the delegation of nursing care activities.

We submit it is nothing short of "extraordinary" for the court of appeals to rely on the professional standards, regulations and ethical obligations which make a nurse a § 2(12) professional, as its justification for finding nurses to be supervisors, if only because such a reading of the Act "would swallow up and displace almost the entirety of the professional-employee inclusion" for registered nurses. *Hendricks*, 454 U.S. at 185. This Court rejected such an approach in *Yeshiva*, and should do so again here.

## CONCLUSION

For the foregoing reasons, and those set forth in the Petitioner's Brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 16, 1993

No. 92-1964

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 84 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

### SUMMARY OF ARGUMENT

The question in this case is whether, as the National Labor Relations Board has consistently determined, health professionals are *not* within the class of "supervisors" delineated by § 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), because the health care profes-

sional's responsibilities include giving on-site job direction to less-skilled employees as an incident of patient care. As this Court indicated in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Board's decisions on this question "accurately capture the intent of Congress." *Id.* at 690.

1. The "supervisor" definition contained in § 2(11) is in several respects ambiguous and in others rife with potential internal contradictions. In particular, the term "in the interest of the employer" has no immediately apparent meaning, since on one level every employee, supervisory or otherwise, acts "in the interest of the employer" as to work tasks generally. Similarly, since no individual can, under the definition, be a supervisor unless he or she performs the activities covered by the definition with authority "not of a merely routine or clerical nature but [with] . . . the use of independent judgment", the statutory terms "*responsibly* to direct" and *effectively* to recommend" (emphasis supplied) must mean something more than simply applying judgment and discretion, although the precise meaning of those terms is not clear from the face of the statute. These problems of construction are exacerbated when § 2(11) is read in conjunction with the immediately succeeding section, § 2(12), defining "professional employee."

2. The legislative history of the Taft-Hartley Act, which added both § 2(11) and § 2(12) to the NLRA, is of substantial aid in pointing the way toward a rational interpretation of those sections. That history shows that Congress was legislating against a background of Board cases holding that only "true" foremen and higher officials are supervisors for NLRA purposes, while "leadmen", "strawmen", and various other lower-level employees with minor supervisory authority over other employees are not. The intent in 1947 was to preserve that general distinction, an intent necessarily leaving a great deal to the



Board's expert judgment on questions of degree in particular factual situations.

3. Following the enactment of Taft-Hartley, the Board continued to hold that limited day-to-day direction by higher skilled employees of lesser skilled employees, does not necessarily make the individual in question a § 2(11) supervisor. And, following the 1947 Congress' lead, the weight of the court of appeals opinions is that to be within § 2(11) the individual in question must in some meaningful sense share the power of management.

4. The Board, with court approval, applied this approach to the health care industry shortly before the 1974 amendments adding nonprofit hospitals to the coverage of the NLRA—holding that direction given to other employees in the exercise of professional discretion incidentally to the professionals' care of patients does not trigger supervisory status. As a result of those rulings both congressional committees concluded that there was no need to clarify the NLRA to assure that health care professionals would continue to be classified as "employees," not as "supervisors".

5. In light of the legislative history of the statute, this Court was correct in *Yeshiva* in approving the Board's construction of the ambiguous statutory terms so as to maintain the distinction between true supervisors and individuals with minor authority to direct other employees.

## ARGUMENT

Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), defines the term "supervisor" for the purposes of the Act. And, NLRA § 2(3), which delineates the "employees" covered by the Act, excludes "any individual employed as a supervisor." The National Labor Relations Board, in applying § 2(11) to nurses and other health care professionals, has consistently concluded that on-site job-task direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care, standing alone, does *not* make the individual a "supervisor." The precise question in this case is whether this administrative interpretation of the statute is rational and consistent with the Act, and therefore entitled to judicial respect and enforcement. *See e.g., Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978).

*NLRB v. Yeshiva University*, 444 U.S. 672 (1980) all but requires that this question be answered "yes." The *Yeshiva* Court noted that, in general, the Board holds "professional employees" to be "supervisors" only "if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals" and, in particular, "[i]n the health-care context the Board asks in each case whether the decisions alleged to be . . . supervisory are 'incidental to' or 'in addition to' the treatment of patients." *Id.* at 690 & n.30. The decisions so holding, the *Yeshiva* Court stated, "accurately capture the intent of Congress." *Id.*[1]

As we now show there is no ground for believing that the *Yeshiva* Court erred in this regard.[2] Certainly the

[1] *Yeshiva* also noted that the Board approach here at issue is one "Congress expressly approved in 1974. S. Rep. No. 93-766, p. 6 (1974) . . ." 437 U.S. at 690 n.30.

[2] The exact issue before the Court in *Yeshiva* involved the implied "managerial employee" exception to the coverage of the NLRA (*see NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)), not the express supervisors' exception. The cases cited by the Board in *Yeshiva* with regard to the limitations on the managerial exclusion were, however, cases concerning supervisors, and it is those cases that the Court said "accurately capture the intent of Congress."



statutory materials yield *no* basis for disapproving the Board's approach already once approved in *Yeshiva*. To the contrary, those materials confirm that when Congress in 1947 expressly excluded supervisors from the coverage of the Act and expressly covered professional employees, the Legislature did not structure the class of § 2(11) supervisors to include all individuals with some supervisory authority in the colloquial sense, but only a subgroup thereof—*viz.*, individuals, such as traditional industrial foremen and higher supervisors, who are, in the words of the *Yeshiva* Court, truly "aligned with management" (444 U.S. at 690) as to those matters central to the NLRA's scheme.

Two statutory sections are principally pertinent to the task at hand. The first is, of course, § 2(11) itself, which provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The second relevant provision is the definition of "professional employee" in § 2(12) of the Act. That section makes clear that the NLRA covers those individuals who do work that is "varied in character as opposed to routine mental, manual, mechanical or physical work" and that "involv[es] the consistent exercise of discretion and judgment in its performance," as well as individuals who have completed their formal professional training but are working "under the supervision of a professional person to

qualify . . . to become a professional employee." *See also* NLRA § 10(b)(1), 29 U.S.C. § 160(b)(1) (providing that professional employees shall not be included in a unit with other employees "unless a majority of such professional employees vote for inclusion in such unit.")

To aid in determining whether the Board's view of the interaction of these two provisions in the health care context is indeed, as *Yeshiva* indicated, a reasonable interpretation of the statute, we begin with the statutory language and structure and then consider the pertinent legislative materials.

1. *Statutory language and structure*: (a) The "supervisor" definition contains numerous terms whose import is not immediately apparent, either viewed in isolation or in the context of the definitional section as a whole.

*First*, exercises of supervisory authority must be "in the interest of the employer." Literally then, § 2(11) states that even if an individual is empowered to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them", he or she is *not* a supervisor unless that power is exercised "in the interest of the employer." To make sense of the supervisor definition, then, there must be some situations in which an individual who has the requisite authority and otherwise meets the "supervisor" definition is *not* a statutory supervisor because the authority is *not* exercise "in the interest of the employer". Otherwise, the phrase "in the interest of the employer" becomes surplusage. Cf. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 111 S.Ct. 2166, 2172 (1991) (statutes should be construed to avoid rendering superfluous any parts thereof); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (same).

To posit that a person with the enumerated statutory supervisory powers could have the authority to exercise those powers *other* than "in the interest of the employer" appears on one level paradoxical: The critical role of the



"supervisor" definition in the statute is the exclusion of "any individual *employed* as a supervisor" (§ 2(3) (emphasis supplied)) from the coverage of the statute. Thus, the supervisors with which the statute is concerned will ordinarily be common law employees of the employer. If the phrase "in the interest of the employer" is read simply to mean "not in the supervisory employee's personal interest" or "in the personal interest of some individual or some entity other than the employer," [3] it is difficult to envisage any common law employee's actions in his role as an employee—at least unambiguous, employment-specific actions such as hiring, transferring, or otherwise changing the status of other employees [4]—that are not actions "in the interest of the employer." Indeed, "[t]he entire work force from the president down to the messenger boy in one sense acts in the interest of the employer as Congress well knew." *International Union of United Brewery v. NLRB*, 298 F.2d 297, 303 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 843 (1962).

To avoid that paradoxical conclusion, the "in the interest of the employer" qualifying term in § 2(11) must have some meaning and some function other than simply

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[3] Put another way, it is certainly the case that supervisors, like other employees, sometimes *abuse* the authority granted by their employer by acting in their own interest rather than that of their employer. For example, supervisors on occasion hire individuals known to be incompetent, because the individuals are relatives, or discharge competent subordinates because of purely personal grudges. But the statute is written in terms of "authority" and "exercise of authority". And, employers do not, as far as we are aware, give supervisors "authority" to act other than in the employer's interest.

[4] As to other kinds of activities, it is certainly true that individuals can do something not "in the interest of the employer" even while on work time, as the common law doctrine of respondeat superior recognizes. *See* William L. Prosser, *Handbook of the Law of Torts* § 69 (3d ed. 1964). It is difficult to understand, however, how someone could while employed hire or discharge or lay off other employees *not* in the employer's interest in the respondeat superior or agency sense.

to assure that the acts in question are taken in the course of the putative supervisor's assigned employment tasks. *Id.; see also NLRB v. Security Guard Service, Inc.*, 384 F.2d 143 (5th Cir. 1967).

*Second*, as to all of the enumerated supervisory powers, "the exercise of such authority [must be] not of a merely routine or clerical nature, but [such as] requires the use of independent judgment." Moreover, while most of the specific powers giving rise to supervisory status—the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline"—are stated unqualifiedly, two of the enumerated powers give rise to supervisory status only under certain circumstances. Thus, direction of other employees, standing alone, does not give rise to supervisory status; rather, to be a supervisor, the individual must have authority "*responsibly* to direct" (emphasis supplied). Similarly, where the individual in question cannot exercise any of the enumerated powers directly, mere recommendation of action in any of those enumerated areas is insufficient to give rise to supervisor status. Rather, an individual is a supervisor only if his or her authority is to recommend "*effectively*" (emphasis supplied) the hiring, firing, suspension, or discipline, for example, of other employees. The interaction of these various phrases gives rise to various problems of interpretation.

Both "responsibly" and "effectively" are open to more than one interpretation. In isolation, "responsibly", for example, could mean that the individual is "responsible", in the sense of answerable, for the directions given, and is not merely a conduit for directions originated by others. This interpretation, however, would not make sense in the context of § 2(11) as a whole. As noted above, the last phrase of the section provides, expressly and separately, that "independent judgment" must be exercised. Consequently, to avoid redundancy, "responsibly" must mean something other than exercising "independent judgment."[5]

[5] For this reason, one court of appeals construction of "responsibly to direct" in § 2(11)—"[t]o be responsible is to be answerable for the discharge of a duty or obligation [and] includes judgment, skill, ability, capacity and integrity" (*Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), *cert. denied*, 338 U.S. 899 (1949))—must be rejected as inconsistent with § 2(11) as a whole.



"Effectively", similarly, could mean that the putative supervisor's decision has *some* independent impact, and is not the mere transmittal or recording of facts routinely taken into account in making personnel decisions. Such an interpretation, however, would again create a redundancy when read in conjunction with the last, "not merely of a routine nature independent judgment" phrase. "Effectively to recommend such action," then, must refer to *determinative* decisionmaking authority as to the kind of personnel matters covered by § 2(11).

Further, since "effectively to recommend such action" applies to *all* the kinds of actions covered by § 2(11), the "supervisor" definition in terms covers both "responsibly directing" other employees and "effectively recommending" to other employees how to carry out their tasks. Again, it must be that "responsibly" and "effectively" have different meanings under the statute; otherwise, the statutory language would be hopelessly redundant. Moreover, one would expect Congress to use the same word in the same statute to convey an identical meaning; where different words are used, the rational inference is that different meanings are intended. Thus, "responsibly to direct" must also mean something more than giving directions that are in fact followed by other employees.

*Third*, while it is reasonably evident what terms such as "hire", "lay off", "recall" and "promote" mean, at least two of the enumerated authorities of supervisors—"transfer" and "assign"—have no inherent meaning outside of a particular industrial context. One would think that, like the other terms listed immediately before and after—*viz.*, "hire, . . . suspend, lay off, recall, promote, discharge, reward, or discipline"—"transfer" and "assign" both refer to a change of an employee's status of some

substantive significance, and of a nontransitory nature. Moreover, since the "supervisor" definition also covers direction of other employees (but not, as noted above, *all* direction of other employees), "transfer" and "assign" must for that reason as well be read to apply to basic *changes* in employment responsibilities, and not simply to day-to-day direction of employees as to the task to be performed.[6]

In sum, the statutory definition of the term "supervisor" is imprecise in several respects. In particular, "in the interest of the employer" must have some meaning other than simply advancing the employer's interests, but that meaning cannot be gleaned from the statutory language alone. And, the definition's applicability to individuals who simply give day-to-day directions to other employees but do not have any of the other indices of supervisory status is, on the face of things, quite limited. For the section as a whole makes it plain that it is not enough to confer supervisory status that the putative supervisor's directions must be followed, or that those directions be nonroutine and involve the exercise of independent judgment. But the bare statutory words do not yield a precise line of demarcation.

(b) Adding to the ambiguity of the "supervisor" definition standing alone is the fact that the Act explicitly covers professional employees, and defines such employees as, *inter alia*, individuals whose work is *not* "routine"

[6] For example, the job "assignment" for a nurse's aid might be to work in a certain nursing home location on a certain shift taking care of patients' physical needs. The precise patients the aid takes care of on a given day can be changed, at the direction of a professional, without in any meaningful sense changing the aid's job "assignment". Similarly, since the aid's duties are necessarily varied, to direct the aid on one day to move patients and on another to change bedclothes is not either to transfer or to reassign that employee. On the other hand, ordering the aid to work at another location across town would, in ordinary parlance, be a "transfer", while altering the aid's shift would be to "assign" the employee anew.



and "involv[es] the *consistent* exercise of discretion and judgment in its performance" (§ 2(12)(a)(i)) (emphasis supplied)). Because professionals are defined in this way, a wooden application of § 2(11) to professionals could eliminate any role for the "not of a merely routine nature/independent judgment" proviso otherwise central to § 2(11). Put another way, if precisely the sort of professional judgment and discretion that brings an employed individual within § 2(12) is sufficient standing alone to take the same individual out of the statute under § 2(11), the inclusion of § 2(12) is rendered all but negatory.

Further, since professionals are necessarily primarily responsible for the end-product of their work, the phrase "responsibly to direct" as applied to professionals cannot mean simply that the employed individual in question is responsible, in the sense of accountable or liable either within the enterprise or outside it, for the work of the directed employee. An attorney, for example, is responsible to his clients and to the court, in both an ethical and a liability sense, if a brief is improperly filed or not filed on time because of a mistake by a clerical employee. *See* Model Rules of Professional Conduct Rule 5.3 (1983).

It is no answer to these observations to note that professionals who have nothing whatever to do with "hire, transfer, suspen[sion], lay off, recall, promot[ion], discharge, assign[ment], reward, . . . discipline or [direction]" of other employees would still be covered by § 2(12) and by the statute, even though they exercise judgment, discretion and responsibility in their work. Few professional employees work in isolation, without some assistance from other employees. As just noted, lawyers have secretaries to assist them; engineers and architects have draftspersons; doctors in hospitals have both clerical assistance and patient care assistance; scientists work with laboratory and other technical assistants. *See generally* Matthew W. Finkin, *The Supervisory Status of Professional Employees*, 45 Fordham L. Rev. 805 (1977).

Indeed, the statutory definition of "professional employees," on its face, recognizes the need for such assistants. Since, according to § 2(12), "professional[s]" do *not* predominantly do "routine mental, manual, mechanical or physical work", and since accomplishing most professional tasks involves a goodly measure of such work, Congress must have contemplated that someone other than the professional employee was doing that work. And, unless Congress was of the view—which it assuredly was not—that secretaries type and file briefs without close direction from an attorney, or that draftspersons are not directed by engineers in producing blueprints, Congress could not have intended a reading of § 2(11) that would so overlap § 2(12).[7]

2. *Legislative History*: The legislative history of the the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act") with regard to the exclusion of "supervisors" and the coverage of "professional employees" is of substantial aid in clearing up the apparent ambiguities and internal tensions in the Act with regard to the reach of the "supervisor" definition. That history confirms that Congress did not intend to exclude as "supervisors" employees who have some role in giving direction to other employees but are not "aligned with management" (*Yeshiva, supra*, 444 U.S. at 690) to the same degree as traditional industrial foremen.[8]

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[7] It is important to be clear that we are *not* arguing that Congress intended a special application of § 2(11) for professional employees. To the contrary, our point is that the express definition of professional employees and the manner in which such employees are defined throws a critical light upon the appropriate construction of § 2(11) as applied to *all* kinds of workers.

[8] This Court has on several other occasions surveyed the legislative history of § 2(11) of the Act. *See NLRB v. Bell Aerospace, supra*, 416 U.S. at 277-285; *Beasley v. Food Fair of North Carolina*, 416 U.S. 658, 658-662 (1974); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 181-184 (1981). Since none of those cases directly involved an application of the "supervisor" definition, the emphasis in these earlier accounts is somewhat different at points from that here.



(a) To understand what Congress intended when it enacted the "supervisor" definition in § 2(11), one must begin with the legal background against which Congress legislated. Section 2(3) of the Wagner Act defined "employee" simply as

> any employee . . . but . . . not . . . any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Within a few years after passage of the Act the Board was confronted with questions as to the applicability of the Act to supervisory employees.

Initially the Board concluded that supervisory employees were covered by the Act, and accordingly were protected in their right to unionize. *Union Collieries Coal Co.*, 41 NLRB 961 (1942); *Godchaux Sugars, Inc.*, 44 NLRB 874 (1942). In *Maryland Drydock Co.*, 49 NLRB 733 (1943), however, the Board reversed course and held that it would refuse to certify bargaining units composed of supervisors.

Shortly thereafter, the Board set out its general test for determining supervisory status:

> As a general rule, it is our policy to exclude from the appropriate unit employees who supervise or direct the employees therein, and who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are accorded effective weight. [*Douglas Aircraft Co.*, 50 NLRB 784 (1943). *See* Eighth Annual Report of the National Labor Relations Board ("Eighth Annual Report") 57 (1943).]

The short-hand *Douglas Aircraft* test, which described supervisory employees as those "with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action," was followed in numerous cases. ***See, e.g., Elec-***

*tric Auto-Lite Co.*, 50 NLRB 1006, 1008 (1943); *Heckman Furniture Co.*, 50 NLRB 834, 837-38 (1943); *E.I. du Point de Nemours & Co.*, 53 NLRB 473, 476 (1943).

In applying this test, the Board consistently distinguished between employees who were "true" supervisors and those who merely performed some supervisory duties. *See, e.g., Lockheed Aircraft Corp.*, 50 NLRB 958, 960-61 (1943) (holding that although firemen "supervise auxiliary firemen" they had no power to "affect the employee status of the auxiliary firemen," and were therefore not true supervisors); *Colonial Press, Inc.*, 50 NLRB 823, 826 (1943) (finding that "working foreman" did not possess "sufficient supervisory authority" to warrant excluding him from bargaining unit); *The Arundel Corp.*, 53 NLRB 466, 470-71 (1943) (finding that a "journeyman machinist, who at times directs and is assisted by helpers according to a custom long prevailing in the machinists' craft" was not a true supervisor); *Douglas Aircraft Co.*, 53 NLRB 486, 491-92 (1943) (finding that certain "leadmen" described as "working employees who are in charge of from 4 to 12 men" were not supervisory employees); *Byron-Jackson Co.*, 53 NLRB 528, 532 (1943) (finding that "leadmen," each of whom "has from 3 to 25 employees under him," were not supervisory employees.)

In March of 1945, in *Packard Motor Car Co.*, 61 NLRB 4 (1945), the Board reconsidered the entire question of whether supervisors had organizational rights under the Act and held, once again, that they did. Nevertheless, "[t]he *Packard* decision did not affect the Board's long-established rule that supervisory employees who are vested with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, are not properly included in bargaining units comprising their subordinates." Tenth Annual Report 34 (1945). Thus, the Board still had the same need to distinguish supervisors from other employees. And until the Taft-Hartley Act was promulgated, the Board adhered to its established test for determining supervisory status. *See* Eleventh Annual Report 31 (1946); Twelfth Annual Report 21-22 (1947).



During this period, the Board continued to distinguish employees who possessed true supervisory authority from leadmen, "strawmen", craftspersons with assistants, and others whose work only involved minor supervisory functions, and continued to rule that the latter were not supervisors for NLRA purposes. For example, in cases that would subsequently be cited with approval in the legislative history of the LMRA, the Board held that the following employees were not supervisors: (1) "Timekeeper Leaders A" who each "direct[ed] the work of from 6 to 20 timekeepers and timekeeper leaders B," *Bethlehem Sparrows Point Shipyard, Inc.*, 65 NLRB 284, 286-7 (1946); (2) two "planning and production department" employees who were classified as "supervisors" by their employer and had assistants, *id.* at 288; (3) "group leaders" who "instruct and assign material to men who work under them in groups from 1 to 40," *Pittsburgh Equitable Meter Co.*, 61 NLRB 880, 882 (1945); (4) "so-called foremen and assistant foremen" who "spend part of their time supervising and the balance in assisting in getting out the work," *The Richards Chemical Works, Inc.*, 65 NLRB 14, 16 (1945); and (5) "[s]o-called 'supervisory employees'" who "direct from one to six employees" and whose "duties are to keep production moving on schedule and to inspect and control the quality of work . . . ." *Endicott Johnson Corp.*, 67 NLRB 1342, 1347 (1946).

(b) The Taft-Hartley Act started in the House as the Hartley bill, reported by the Education and Labor Committee after 31 days of hearings. The Committee Report accompanying the Hartley bill (H.R. Rep. 245, 80th Cong. 1st Sess. (1947)) traced the history of the Board's treatment of foremen, and decried at length the evils that flow "when the *foremen* unionize." *Id.* at 14, *re-*

*printed in* NLRB, Legislative History of the Labor-Management Relations Act, 1947 ("Leg. Hist.") 305 (1985) (emphasis supplied). The Committee concluded that:

> If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act*, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file. [*Id.* at 306; emphasis in original.]

The Hartley bill passed the House after several days of debate. Neither the House Report nor any statements on the floor of the House made any mention of a disagreement with the Board's definition of supervisor insofar as that definition excluded those employees who perform some secondary supervisory functions, but only with the Board's decision to certify bargaining units of *foremen* and of certain categories of "confidential" and labor relations employees.

(c) While the House was at work on the Hartley bill, the Senate Committee on Labor and Public Welfare, chaired by Senator Taft, had before it a labor bill introduced by the chairman. After six weeks of hearings, the Committee reported a bill to the floor which, like the Hartley bill, sought to overturn *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1949) (upholding the Board's extension of organizing rights to supervisors) by treating supervisors as "management" and thus removing them from the protection of the NLRA.

The Senate Committee bill defined supervisor as follows:

> (11) The term 'supervisor' means any individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,



> or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [Leg. Hist. at 104.]

The Senate Committee Report explained that:

> In framing this definition, the committee exercised great care, desiring that the employees herein excluded from the coverage of the act be *truly supervisory*.
>
> * * * *
>
> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. *It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action. In other words the committee adopted the test that which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included on the same bargaining unit with the rank and file.* (*Bethlehem Steel Company, Sparrows Point Division*, 65 N.L.R.B. 284 . . . *Pittsburgh Equitable Meter Company*, 61 N.L.R.B. 880 . . . *Richards Chemical Works*, 65 N.L.R.B. 14 . . . *Endicott-Johnson*, 67 N.L.R.B. 1342, 1347.) [Leg. Hist. at 410, 423; emphasis supplied.][9]

In introducing the Committee bill, Senator Taft emphasized that the purpose of the provision regarding supervisors was to reverse the Board's decisions regarding *foremen*, and that the Committee's "definition of foremen is applied to persons who are strictly foremen . . . .

[9] The cases cited in the Senate Report are discussed, *supra*, at pp. 14-15.

[not] any of the others about whom controversy has arisen." *Id.* at 1009.

Senator Ellender likewise explained that the point of the supervisors provision was to overrule *Packard Motor* which, he stated, would permit "even the vice presidents working for a large corporation . . . [to] compel their employer to recognize them." Leg. Hist. at 1064. In a colloquy with Senator Aiken, Senator Ellender emphasized the narrowness of the provision and the lack of any intention to interfere with the Board's established tests for interfering with the determination of supervisory status:

> Mr. AIKEN. The Senator will recall and I think it should be in the Record, that the definition of a supervisory employee was considerably changed in committee. As originally written into the bill, it included . . . many other types of workmen, who very clearly were not supervisors.
>
> Mr. ELLENDER. The Senator is correct.
>
> Mr. AIKEN. The committee then more closely defined the word 'supervisor', *to include supervisors in fact, rather than all the other groups of employees whom some employers would have liked to have had included in the list of supervisory employees,* so that such employees would not be able to join the union and gain the benefits of the Labor Relations Act.
>
> * * * *
>
> Mr. AIKEN. In dozens of cases labor wanted nothing whatever to be done, while industry wanted to include in the definition of 'supervisor' any number of occupational employees who had no business whatever being included in the definition of 'supervisor.' The Committee simply had to work out for itself what it thought was a proper definition of a supervisor.
>
> Mr. ELLENDER. The Senator is correct.
>
> * * * *
>
> Mr. ELLENDER. Let me state to the distinguished Senator that *the definition adopted by our committee is the one that has been put into practice for several years last past by the NLRB.* [Leg. Hist. at 1064-65; emphasis supplied.]



Senator Ellender later stated again on the Senate floor that "[t]he description of a supervisor as written in the bill is practically the same used by the NLRB for the past 5 or 6 years." *Id.* at 1068.

The Committee's version of § 2(11) was altered prior to passage by an amendment offered by Senator Flanders to add the words "or responsibly to direct them" after the word "employees." Leg. Hist. at 1303. Senator Flanders explained the purpose of the added language:

> As an employer for many years past, and until I resigned to enter this body, I can say that the definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a large responsibility for the exercise of personal judgment based on personal experience, training and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned. *Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees," as*

*enumerated in the [Senate Committee] report.*" Their essential managerial duties are best defined by the words, "direct responsibly," which I am suggesting. [*Id.* at 1303, emphasis supplied.]

The proposed amendment was immediately accepted by Senator Taft, who stated that it "merely adds to the definition of the word 'supervisor.' The definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years; but I have no objection certainly to including the words 'or responsibility [sic] to direct them.'" Leg. Hist. at 1304. The amendment passed by voice vote without further debate. *Id.* As a result, perhaps, of an error in enunciation or transcription, the amendment as it passed the Senate read not "responsibly to direct," as first stated by Senator Flanders, but "responsibility to direct." H.R. 3020 as Passed Senate, § 2(11), Leg. Hist. at 232.

(d) The differences between the House and Senate bills, including the differences in the definition of "supervisor", were submitted to a Conference Committee. In conference, the Senate prevailed on the scope of the "supervisor" provision, and the Senate provision was incorporated into the Conference Committee report with a single, unmentioned change—the term "responsibility to direct" in the Senate bill as finally enacted was changed to "responsibly to direct." Leg. Hist. at 508. In a written summary inserted into the Congressional Record, Senator Taft reported the conference action to the Senate as follows:

> (8) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. *The Senate Amendment, which the conference ultimately adopted, is limited to bona fide supervisors.* The House had included numerous other classes. . . .



> *The Senate Amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.* [Leg. Hist. at 1537; emphasis added.]

The House conferees conceded defeat in their report: "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment." *Id.* at 539.

(e) The sections of the Taft-Hartley Act pertaining to professional employees had a much less tortuous route through the legislative process than the section relating to supervisors. The House bill, both as reported by the Education and Labor Committee and as passed by the House, contained no definition of professional employee, but did contain a reference to such employees in a section specifying special representation procedures. H.R. 3020 as reported, § 9(f)(2), Leg. Hist. at 62; H.R. 3020 as passed House, § 9(f)(2), Leg. Hist. at 189. The Senate bill, as reported and as it passed the Senate, contained essentially the same definition of "professional employee" as in the final Act. S. 1126 as reported, § 2(12), Leg. Hist. at 104-05; H.R. 3020 as passed Senate, § 2(12), Leg. Hist. at 232-33.

The House Committee report did not separately discuss professional employees. The Senate Committee report, however, provides some insight into the purpose of defining professional employees specially in the statute and providing tailored election proceedings:

> Although there has been a trend in recent years for manufacturing corporations to employ many professional persons, including *architects, engineers, scientists, lawyers, and nurses*, no corresponding attention was given by Congress to their special problems. Nevertheless such employees have a great community of interest in *maintaining certain professional standards*. [S. Rep. No. 105 on S. 1126 at 11, Leg. Hist. at 417.]

*See also id.* at 19, Leg. Hist. at 425 ("the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses.")[10]

The Conference Committee report incorporated "the same definition of 'professional employee' as that contained in the Senate amendment" and "accord[ed] to this category the same treatment which was provided for them in . . . the House bill." H. Conf. Rep. No. 510 on H.R. 3020 at 36, Leg. Hist. at 540. The House Conference Committee Report explained that "[t]his definition in general covers such persons as legal, engineering, scientific and medical personnel *together with their junior professional assistants.*" *Id.* at 36, Leg. Hist. at 540 (emphasis supplied). Thus, there was express recognition of the fact that professional employees *do* often have "assistants", and would retain their employee status nonetheless.

(f) As anticipated, the Taft-Hartley bill was vetoed by President Truman. Leg. Hist. at 915-22. The veto was overridden by a vote of 331-83 in the House, *id.* at 922-23, and a vote of 68-25 in the Senate, *id.* at 1657. Accordingly, the Taft-Hartley Act became law.

(3) *Post-1947 Application of § 2(11)*: Following passage of the LMRA, the consequences of classifying an individual as a supervisor had changed, but the need to differentiate between "supervisors" and statutory "employees" had not. Recognizing that "[t]he definition of supervisors contained in section 2(11) of the act as amended is substantially a codification of the definition formulated and uniformly applied by the Board for several years before the amendment of the statute" (Thirteenth Annual Report 38 (1948) (footnotes omitted)), the Board continued to hold—as Congress had specifically intended—

[10] These explanations are noteworthy in that they make clear that Congress specifically intended to cover the very groups that traditionally work with clerical or technical assistants. *See* pp. 11-12, *supra*.



that minor supervisory duties do not automatically make an employee a supervisor, particularly where those duties involve only the direction of other employees. *George Ehlenberger and Co.*, 77 NLRB 701, 703 (1948) ("leadmen" whose "duties involve the direction or guidance of other employees in the course of production operations"); *H.J. Heinz Co.*, 77 NLRB 1103, 1105-06 ("head cooks" who "spend approximately 90 percent of their time doing manual work, and . . . 10 percent of their time . . . instructing other employees in the department" and a "leadman" who spends "approximately 50 percent of his time . . . doing manual work, and approximately 10 percent of his time . . . directing the work of his crew"); *The Austin Co.*, 77 NLRB 938, 943 (1948) (engineering department employees who "may assign and guide the work of certain of their professional colleagues" but who actually "are no more than group leaders").

The Board has since the early post-Taft Hartley cases continued to view the governing statutory distinction as one between individuals with the limited authority over the work of other employees characteristic of "leadmen" and similar employees, and the "*real* power in the interest of the employer' to take *meaningful* action with respect to the statutory tests' " (*International Union of United Brewery v. NLRB, supra*, 298 F.2d at 303 (emphasis supplied)) characteristic of the true supervisors Congress intended to exclude from the Act.[11] And the courts have, in the main, left it to the Board to draw this elusive line, recognizing that "the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are . . . infinite and subtle." *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962), (quoting *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir.

[11] *See, e.g., Injected Rubber Products Corp.*, 258 NLRB 687, 688-92 (1981); *Aquatech, Inc.*, 297 NLRB 711, 716-17 (1990), *enf'd*, 926 F.2d 538 (6th Cir. 1991).

1961)). *See also Food Store Employees Local 347 v. NLRB*, 422 F.2d 685, 690 (D.C. Cir., 1969) ("the finely-shaded gradations of power in any enterprise proscribe a wooden reading of Section 2(11). Almost any employee "directs" other employees in some fashion at some time."); *NLRB v. Security Guard Service, Inc., supra*, 384 F.2d at 149 ("[s]ome kinship to management, some emphatic relationship between employer and employee must exist before the latter becomes a supervisor for the former"); *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959) (question is "whether the individual is merely a superior workman or lead man who exercises the control of a skilled worker over less capable employees or is a supervisor who shares the power of management.").

This general approach to reconciling the tensions within the statutory language and structure, which carries out Congress' intent as expressed consistently during the Taft-Hartley deliberations, was applied as well, before the 1974 NLRA health care amendments, to the health care industry. In *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970), for example, the Board held that nurses do not necessarily become supervisors simply because they "inform other, lesser skilled employees as to the work to be performed for patients and insure that such work is done," where such direction is "soley a product of their highly developed professional skills and do[es] not, without more, constitute an exercise of supervisory authority in the interest of their Employer." *Id.* at 951. Analogizing such nurses to "[t]he leadman or straw boss [who] may give minor orders or directives or supervise the work of others but . . . is *not necessarily* part of management and a supervisor under the Act," the Ninth Circuit upheld the Board's conclusion. *NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir., 1973) (empasis in original). *See also id.*, citing various "leadmen" and similar cases, including *NLRB v. Security Guard Service, supra.*



It was only a few months after the Ninth Circuit decision in *Doctors' Hospital of Modesto* that committees of both the House and the Senate considered whether to modify the definition of "supervisor" in the course of amending the NLRA to cover nonprofit hospitals. Organizations of health care professionals had argued for a clarifying amendment while *Doctors' Hospital* was before the Ninth Circuit, noting that health care professionals tend to work in patient care teams, with higher skilled professionals giving direction to lesser skilled employees as to the care of patients. *See* Hearings on S. 794 before the Subcomm. on Labor and Public Welfare, 93d Cong., 1st Sess. (1973) at 122 (Statement of American Nurses' Assn.); *id.* at 296 (Statement for the Committee of Interns and Residents).

Both the House Committee and the Senate Committee considering the health care amendments "studied [supervisor] definition with particular reference to health care professionals" and "conclude[d] that the proposed amendment is unnecessary *because of existing Board decisions.*" S. Rep. No. 93-766, 93d Cong. 2d Sess. 6 (1974), *reprinted in* Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 ("1974 Leg. Hist."), at 13 (emphasis supplied); H.R. Rep. No. 93-1051, 93d Cong. 2d Sess. 7 (1974), 1974 Leg. Hist. at 275 (emphasis supplied):

> The Committee notes that the Board has carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and *thus is not the exercise of supervisory authority in the interest of the employer.* [1974 Leg. Hist. at 13, 275 (emphasis supplied).]

(4) *The Lessons*: In *Yeshiva* this Court cited the 1974 congressional committee reports, as well as the Board and Ninth Circuit opinions in *Doctors' Hospital*, as support for its conclusions that the Board's general approach to dividing professional employees from supervisors "aligned

with management . . . accurately captures the intent of Congress." 444 U.S. at 690 & n.30. The statutory language and legislative materials reviewed above amply confirm the *Yeshiva* Court's conclusion.

First, the legislative history squarely shows an intention to draw a line specifying that "individuals generally regarded as foremen and employees of like or higher rank" (Leg. Hist. at 1537), are "supervisors" and leaving individuals with only a minor supervisory role as "employees" covered by the Act. And, the "leadman" and "strawman" examples cited by critical members of Congress indicate, in particular, that day-to-day on-site direction by higher skilled employees of lesser skilled ones is *insufficient*, either standing alone or combined with the routinized exercise of other statutory supervisory attributes, to meet the § 2(11) definition of "supervisor".

*Second*, the statutory language, while ambiguous and potentially internally inconsistent, is certainly subject to a rational reading consistent with this conclusion. In particular, the term "in the interest of the employer", as noted, *cannot* be read to denote simply advancing the employer's interests. *See* pp. 6-8, *supra*. It is therefore reasonable to view that phrase, as the Board and the 1974 Congressional committees have done, as indicating that any activities otherwise conferring supervisory status must be intended to, and be perceived as, significantly advancing *management's* labor relations interests as opposed to advancing the overall business of the enterprise, in this instance patient care.[12] Similarly, in applying the "in

[12] One Board Regional Director in a health care case put this point well:

> In following this dictate of congressional intent, it may be that the Board has at times explained its rationale for deciding that certain powers exercised by health care professionals or technicals did not constitute supervisory authority by accentuating a dichotomy between that authority exercised on behalf of the employer and that exercised in the interests of patient care. . . . It is obvious, however, that Congress and certainly the Board did not intend a mutually exclusive dichotomy. Indeed, as set out by Congress, this test ["in the interest of the employer"] is simply another way of asking the question put in any case involving the issue of supervisory status: Does the individual identify with the interests of the employer, rather than with the interests of employees. [*Beverly Enterprises*, 275 NLRB 943, 946 (1985) (Regional Director's Report)].



dependent judgment" qualifying phrase in the "supervisor" definition, it is sensible to exclude the exercise of "professional" judgment, as opposed to "managerial" judgment.[13] Finally, in determining whether or not an individual is a supervisor on the basis of the "responsibly to direct" prong of the "supervisor" definition alone, it is, for reasons surveyed previously, rational to view that prong as adding to the § 2(11) class of supervisors only individuals who, like traditional industrial foremen, have

[13] To illustrate: In giving direction to secretaries concerning what work to do and how to do it, attorneys are exercising, ordinarily, simply their professional judgment, in an effort to get their own jobs done properly. Such exercise of judgment should not count as the kind of "independent judgment" necessary to come within the "supervisor" definition. On the other hand, the determinative exercise of independent judgment regarding how many secretaries to hire, how much to pay them, or whether or not to discipline them for coming in late is not directly connected to the practice of law, and could trigger supervisory status.

We note that this distinction between direct job-related independent judgment and other kinds of independent judgment should not be limited to professional employees. The definition of professional employees was included in the statute for a particular, unit-determinative reason, and was certainly not intended to indicate that some non-professional employees do not as well routinely exercise independent judgment in the performance of their jobs. Craftspersons, for example, exercise such judgment as to their craft. And, as noted, the lead person cases Congress expressly approved recognize that highly skilled employees may exercise judgment connected to that skill in giving direction to less skilled employees without becoming statutory supervisors.

Once again, our point is that the professional employee definition is useful in delineating the reach of the supervisor exception, not that there is a special rule regarding supervisory status for professionals.

in their sole charge and as a primary responsibility the *major* decisions concerning what work is to get done, when it gets done and how it gets done.[14] If not so read, Congress' express intention to leave within the Act's coverage individuals who have a minor role in providing on-site directions to other individuals employed by the employer would be negated.

The endpoint of this analysis is that there is no formulaic answer to the question whether or not particular individuals are "supervisors" based upon their direction of other employees. Rather, Congress intended that the determination of this question remain with the Board, which is to decide whether all the circumstances indicate that individuals said to be supervisors exercise the level of responsibility with respect to the direction of other employees that truly places in the ranks of management, or, instead, the level of responsibility that truly places them in the ranks of highly skilled "employees" performing, incidentally to their primary employee work tasks, a minor supervisory role.

This Court has left similar determinations to the Board even when there is *no* express statutory guidance as to the governing indices of managerial status. *NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 289-90 & n.19 (remanding to the Board to determine whether a particular class of employees comes within the *implied* statutory exclusion of managerial employees without any labor relations responsibilities, and noting that "the Board has

[14] To recapitulate in this regard: "Responsibly" cannot mean simply the exercise of nonroutine judgment, since that requirement is independently contained in the definition; it cannot mean only accountability, since professionals are necessarily accountable for their work product, whether produced with the aid of assistants or not; and it cannot justify a narrow focus upon whether or not there are other on-site supervisors to second-guess the directions given, since there is a separate statutory provision regarding the effectiveness—as opposed to the level of ultimate responsibility—of any directions given. *See* pp. 8-10, *supra*.



had ample experience in defining the term 'managerial' in the manner which we think the Act contemplates. . . . [by focusing on] the employees' actual job responsibilities, authority, and relationship to management.") The "gradations . . . infinite and subtle" (*Marine Engineers Beneficial Association v. Interlake Steamship Co., supra*, 370 U.S. at 179 n.6), within hierarchical organizations are no more so when the task is to apply the express provision governing supervisory status than when it is to apply the implied managerial exception. In both instances the warrant and the need is to entrust to the administrative process the drawing of the line between "management" and "employees."

## CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Sixth Circuit should be reversed and the Decision and Order of the NLRB should be enforced.

Respectfully submitted,

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No. 92-1964



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD
*Petitioner,*

*v.*

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

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## BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF RESPONDENT

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**IN THE SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1993

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NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA, Respondent.

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# BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF RESPONDENT

## INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board, related developments under the National Labor Relations Act, and to provide support to employer interests on those issues which affect a broad section of industry. COLLE's formation recognizes the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

In the instant case, the National Labor Relations Board entered an order fundamentally altering management's expectation that it shall retain the loyalty of its supervisory personnel. The expectation extends to preserving and protecting employer property and business interests and ensuring its right to do business without direct interference.

The manner in which the legal issues under review are resolved by the Court is extremely important to employers throughout the

nation. The Board's decision calls into question one of the principle features of the National Labor Relations Act ("NLRA") that is designed to protect management's right to direct its business. However, the Board's foray into the health care field, emasculates this statutory interest and sweeps aside years of caselaw decisions articulating the importance of employer interests.

For these reasons, it is within the interest of employers to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures sufficient to permit informed judicial review. Moreover, it has become painfully clear that it is too expensive for employer's to repeatedly challenge Board findings in the appellate courts when the deference given to the Board is so high.

The parties have thus far primarily focused on issues involving judicial review of administrative decisions and the power of the Board to amend its interpretation of the statute. However, COLLE believes that the issue presented in this case includes not only whether the Board's analysis is the correct test, but whether as applied, is manifestly inconsistent with the Act.

COLLE thus brings to this case a diverse perspective not presently represented. Therefore, COLLE's participation may assist the Court in obtaining full consideration of the public-interest issues.

## ISSUE PRESENTED

Whether the statutory definition of a supervisor in Section 2(11) of the National Labor Relations Act permits the Board to qualify the definition in any respect.

## STATEMENT OF THE CASE

Respondent Health Care & Retirement Corporation of America owns a 100 bed nursing home located in Urbana, Ohio. The home employs approximately 100 persons and is managed by a staff composed of a Director of Nursing, an Assistant Director of Nursing,



thirteen to fifteen LPN's, and fifty-five aides. If nurses are not counted as supervisors, the supervisor-employee ratio would be 30:1. If counted, the ratio is 4:1. 47a.

In the spring of 1989, three nurses believed that the facility was being run ineffectively and sought to air this matter with the nursing home administrator. When informed to schedule an appointment, these nurses instead chose to drive to the corporate headquarters the next day to meet with the corporate Director of Human Resources.

After an investigation, management chose to implement a program to meet the nurses's grievances and also requested the support of the nursing staff. During the investigation, several items concerning the three nurses came to the attention of the Respondent. These matters included improper documentation of medical records as well as unexcused absences. As a result of these and other problems, the three nurses were asked to resign or be fired. 16a.

The Board found the nurses to be employees and entitled to protected concerted activity under the Act. 13a. The court of appeals disagreed. It determined that the statutory tests found in Section 2(11) of the Act, 29 U.S.C. § 152(11), applied in the disjunctive, 7a, so that if a nurse met any of the tests for a supervisor, then the employer could expect their "undistracted loyalty." 6a.

The court of appeals found that these nurses did not meet the statutory test because the staff nurses at the very least had the authority to assign aides and to direct them. 9A. Therefore, the court found that the Board's Order did not comport with the Act.

## SUMMARY OF ARGUMENT

The Congress established two essential requirements in the National Labor Relations Act as it applies to the health care field. First, that management must expect that it would continue to act through its selected representatives and supervisors. To ensure their loyalty, these persons were not provided the protection of the Act. Secondly, the Congress established a statutory test that identifies supervisors as "any individual" who could exercise any of the

following acts: "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, **or** discipline other employees." 29 U.S.C. § 152(11) (emphasis added).

The statutory language plainly reads in the disjunctive. The legislative history also establishes that the Congress expected the Board to determine what persons are "supervisors" under the caselaw established by the Board as of 1974. However, the Board has chosen to proceed beyond the language of the statute and its legislative history. It has chosen to apply in the health care field a test not found elsewhere in the statute, whether the health care person is performing serves primarily for a patient rather than the employer. That test finds no support in the statute or legislative history. Consequently, the Board's mechanism to ascertain who is a "supervisor" under the Act is contrary to the Act and should not be sustained.

## ARGUMENT

### THE COURT MUST APPLY THE STATUTORY RULE THAT THE BOARD MUST FOLLOW THE STATUTORY LANGUAGE OF THE ACT

The Board has determined that when a principal function of the nurse and the aides who report to them is the provision of *patient* care, then the nurses are not supervisors. As applied by the Board, this extra-statutory standard constitutes nothing less than an "amendment" of the Act for health care employers, and is well beyond the standards previously stated by this Court.

### A. THE BOARD'S DECISION DOES NOT SATISFY LEGAL REQUIREMENTS REGARDING SUFFICIENCY OF EVIDENCE IN SUPERVISORY STATUS DETERMINATIONS.

This case comes before the Court with the understanding that if it is unable to:



> conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view, we may deny enforcement.

*Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

In essence, the Board's Decision and Order manages to bypass virtually every aspect of supervisory authority through the expedient application of the term "patient care." This "analysis" has the unavoidable effect of "amending" Section 2(11) of the Act[1] to create a different legal standard for determining supervisory status in health care institutions – something that *Congress expressly* refused to do when it considered the issue in the debates that culminated in the 1974 Health Care Amendments to the Act. It is axiomatic that the Board majority should not be permitted to do that which Congress, having been afforded the opportunity, specifically refused to do.

#### 1. The Board has Created a New Standard for Supervisory Status in the Health Care Industry.

The current form of the Board's "patient care" rationale had its genesis in *Beverly Manor Convalescent Ctrs.*, 275 N.L.R.B. 943

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[1]Section 2(11) of the Act, 29 U.S.C. § 152 (11), provides that:

> [t]he term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

(1985) *("Beverly Manor")*, *remanded from* 727 F.2d 591 (6th Cir. 1984).[2] There, the Board reasoned as follows:

> [I]f it is found that some authority exists which in other contexts would be found to bestow supervisory status, the qualitative nature of this authority *must be subjected to a second-step analysis in order to determine the ends for which it is exercised.* Thus, acts which would ordinarily be supervisory may, in the health care context, indicate no more than, the exercise of technical or professional judgment.

*Beverly Manor*, 275 N.L.R.B. at 946 (emphasis added).

The *Beverly Manor* Board found support for this extra-statutory gloss in the legislative history of the 1974 Amendments to the Act. "[T]he Senate indicated that a health care professional does not exercise authority in the interest of an employer when that individual's 'direction' to other employees is the 'exercise of professional judgment' incidental to the professional's treatment of patients." 275 N.L.R.B. at 946, *citing Sutter Community Hospital of Sacramento, Inc.*, 227 N.L.R.B. 181, 192, *citing* S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (April 2, 1974).

*Beverly Manor* suggests that, as a "dictate of congressional intent," findings of supervisory status in health care institutions must be supported by "additional personnel authority which more directly promotes the interests of the employer and which is not motivated by patient *care needs*." 275 N.L.R.B. at 946-47 (emphasis added). It is, says the *Beverly Manor* Board, "[the] congressional intent that

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[2]The Board's Decision and the ALJ's opinion also cite various other Board cases which themselves rely on *Beverly Manor Convalescent Ctrs.*: *Waverly-Cedar Falls Health Care. Inc.*, 297 N.L.R.B. No. 40 (November 28, 1989); *Phelps Community Medical Ctr.*, 295 N.L.R.B. No. 55 (June 15, 1989); *The Ohio Masonic Home, Inc.*, 295 N.L.R.B. No. 44 (June 15, 1989); *Passavant Health Ctr.*, 284 N.L.R.B. 887, 889 (1987). The Board also cites to *Riverchase Care Ctr.*, 304 N.L.R.B. 861 (1991) at n.1. That decision was denied enforcement by the Fourth Circuit. F.2d (4th Cir. 1992) (unpublished opinion).



when direction of other employees is given *in connection with* treatment of patients that this is not the exercise of supervisory authority in the interest of the employer." 275 N.L.R.B. at 947 (emphasis added). The Board sums up this hypothesis, stating that it is "Congress' *mandate*, that any ostensible authority exercised by health care providers *must be* scrutinized to determine by what it is motivated...." If the putative supervisor's actions "grow out of professional or technical concerns for patient well being," they cannot, according to *Beverly Manor*, be supervisors. (emphasis added).

The Board both misreads the portion of the legislative history on which it relies and ignores other highly probative portions which the Board apparently considers inconveniently contrary to its "agenda."

**2. Legislative History Conclusively Establishes that Congress Intended the Board to Continue to Apply the Same Statutory Analysis Used Prior to the 1974 Amendments.**

As originally enacted, the Act contained no definition of "supervisor." 49 Stat. 449 (1935). Section 2(11) as it exists today, was introduced in the Taft-Hartley Amendments in 1947. 61 Stat. 136 (1947).

Congress pointed out at that time that a "lead person" or "straw boss" whose minimal "authority" derived from greater training, skill or experience should not fall within the Act's definition of "supervisor." 2 Legislative History of the Management Relations Act of 1947, 1303 (1947); *cited in NLRB v. Pilot Freight Carriers*, 558 F.2d 205 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978). In 1974, Congress again amended the Act, extending its coverage to non-profit hospitals. 88 Stat. 395 (1974).

In the debates that culminated in the 1974 amendments (the "Health Care Amendments"), various interest groups urged Congress to amend Section 2(11) to exclude nurses and other health care professionals. One proposal, made by the American Nurses'

Association, was "to qualify [Section 2(11)] as it relates to professional registered nurse authority and responsibilities. A registered nurse should not be deemed a supervisor when exercising independent professional judgment." *Coverage of Nonprofit Hospitals Under The National Labor Relations Act 1972: Hearings on H.R. 11357 Before The Subcommittee on Labor and Public Welfare*, 92d Cong., 2d Sess. 19 (1372) (Statement of American Nurses Association) (emphasis added); *Extension Of NLRA To Nonprofit Hospital Employees: Hearings on H.R. 1236 Before The Subcommittee On Labor Of The House of Representatives Committee on Education And Labor*, 93d Cong., 1st Sess. 18 (1973) (Statement of the American Nurses' Association).

The Senate Committee, which reported out the bill which ultimately passed, responded:

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." *The Committee has studied this definition* with particular reference to health care professionals ... *and concludes that the proposed amendment is unnecessary because of existing Board decisions*. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professionals treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts in this manner when making its determinations.

S. Rep. No. 766, 93d Cong., 2d Sess. 6 (1974) (emphasis added). Congress was thus satisfied that Board law in 1974 accurately reflected congressional intent (*i.e.*, did not deem "lead persons" or "straw bosses" whose authority arose solely from "greater training, skill, or experience," to be statutory supervisors). Congress specifically rejected efforts to amend the Act and it expressly directed the Board to continue to utilize the same principles it had always applied in considering supervisory status in the health care industry.



Several important points emerge from the foregoing legislative history. First, the above quoted portions of the 1974 Senate Report are the only express statements of congressional intent concerning the specific issue of supervisory status of health care professionals. There simply is no expressly articulated basis for the elaborate statements in *Beverly Manor* that purport to reflect "congressional intent."

Second, to the extent that congressional intent may be inferred from the Health Care Amendments, the inferences do not support the Board's construction of Section 2(11). Indeed, by axiom of statutory construction, the inference is unavoidable that Congress did not intend the Board to adopt as a rule of law a proposed amendment that Congress considered and specifically rejected. Yet, the Board has adopted as a rule of law virtually the precise definition of "supervisor" that the American Nursing Association proposed in 1974 and that Congress specifically rejected.

Third, the Board ignores completely the congressional direction that it continue to make supervisory status determinations in the health care industry in the same case by case manner that it had prior to 1974. The pre-1974 cases, discussed below, make it clear that the Board has misconstrued Section 2(11) and congressional intent, and that the Board majority herein has improperly found Respondent's nurse supervisors to be rank-and-file employees.

Thus, the Board drew no "reasonable distinction" when it crafted the patient service exception to the statutory definition of "supervisor." *Cf.* Pet. Br. at 16.

**3. Under Pre-1974 Board Law Nurse Supervisors Are Unquestionably Statutory Supervisors.**

As discussed below, the indicia of supervisory status possessed by Respondent's nurse supervisors, and discounted by the Board on

the basis that they are related to "patient care," would conclusively prove they are supervisors under the very pre-1974 Board decisions that Congress expected the Board to adhere to.

The pre-1974 Board decisions recognized that nurses' involvement in the disciplinary processes indicated supervisory status. *National Living Ctrs., Inc. d/b/a Autumn Leaf Lodge*, 193 N.L.R.B. 638, 639 (1971), *enf'd.*, 462 F.2d 575 (5th Cir. 1972) (nursing assistants were recommended for termination); *Rosewood. Inc.*, 185 N.L.R.B. 193, 194 (1970) (power to discipline nursing assistants). Other indicia of status includes the power to enforce policies of the Home through disciplinary measures. *Avon Convalescent Ctr., Inc.*, 200 N.L.R.B. 702, 706 (1972), *enf'd.*, 490 F.2d 1384 (6th Cir. 1974) (personnel policy empowered nurses to enforce rules and authorized nurses to "write up" nursing assistants for violations).

The ability to transfer nursing assistants to different jobs was also indicative of supervisory status. *Avon*, 200 N.L.R.B. at 706; *Autumn Leaf*, 193 N.L.R.B. at 639; *Doctors' Hospital*, 175 N.L.R.B. 354 (1969) (subsequent history). Another supervisory indicia was the authority to permit employees to leave early; *New Fairview Hall Convalescent Ctr.*, 206 N.L.R.B. 688, 749 (1973), *enf'd.*, 520 F.2d 1316 (2d Cir. 1975); *Rosewood*, 185 N.L.R.B. at 194; or to excuse lateness. *New Fairview*, 206 N.L.R.B. at 749. Nurses who adjusted schedules or assigned meal and break periods were also deemed supervisors. *New Fairview*, 206 N.L.R.B. at 749; *Avon*, 200 N.L.R.B. at 706. The power to adjust time cards was deemed a supervisory function. *New Fairview*, 206 N.L.R.B. at 749.

The Board held that the authority to call in employees to ensure staffing was indicative of supervisory status, *Garrard Convalescent Home, Inc.*, 199 N.L.R.B. 711, 717 (1972), *enf'd.*, 489 F.2d 736 (6th Cir. 1974); *Rockville Nursing Ctr.*, 193 N.L.R.B. 959, 962 (1971); as was the preparation of employee evaluations, *New Fairview*, 206 N.L.R.B. at 749; *Doctors' Hospital*, 175 N.L.R.B. at 354. Where nurses adjust employee grievances, *New Fairview*, 206 N.L.R.B. at 749, and where no other persons capable of exercising supervisory functions are present, they were deemed supervisors. *See NLRB v.*



*Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987).

Higher pay than other employees was considered an indicia of supervisory status. *Doctors' Hospital*, 175 N.L.R.B. at 354. Where nurses were the highest ranking persons in the facility, the Board recognized them as supervisors. *Rockville*, 193 N.L.R.B. at 717; *Autumn Leaf*, 193 N.L.R.B. at 638-39. Nurses who attended in-service meetings concerning their supervisory duties were also considered supervisors under Section 2(11). *Avon*, 200 N.L.R.B. at 705.

Indeed, before 1974, the Board held that supervising the work of nurses aides in the administration of patient care services qualified an LPN as a supervisor under the Act. *University Nursing Home, Inc.*, 168 N.L.R.B. 263, 264 (1967). Assigning patient care duties to nursing assistants was also indicative of supervisory status. *Autumn Leaf*, 193 N.L.R.B. at 638-639. This finding was not inadvertent. Indeed, the Board specifically explained why such duties were supervisory:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.... Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules ... is compelling evidence that their direction and assignment of employees is substantial and meaningful...
> ...[E]ach of the ... nurses concerned was at all material times a supervisor, as defined in Section 2(11) of the Act because she had authority in the interest of the [employer] to "assign" and "responsibly to direct" other employees, as comprehended by that section.

*Avon*, 200 N.L.R.B. at 706.

In but one case prior to 1974 -- and indeed, three years before the above quote in *Avon* -- did the Board find that nurses were not supervisors because their duties were "solely a product of highly developed professional skills." In that case, the Board found that the nurses' authority was simply "to inform other, lesser skilled employees as to the work to be performed for patients" and was therefore analogous to the authority of the "lead person" or "straw boss" who, in the consideration of the Taft-Hartley amendments, Congress deemed non-supervisory. *Doctors' Hospital*, 175 N.L.R.B. at 354; *Doctors' Hospital of Modesto, Inc.*, 183 N.L.R.B. 950, 952 (1970) (same case).[3]

The overwhelming weight of pre-1974 Board law establishes that the N.L.R.B. evaluated supervisory cases in the health care industry according the traditional statutory indicia that it applied when making supervisory status determinations in any other industry. No pre-1974 case even suggests that the Board should apply any higher level of "scrutiny," or undertake any investigation of "motive" when making supervisory status determinations in the health care industry. Nor does any case even infer that activities "incidental to" or "in connection with" patient care should be outside the parameters of Section 2(11).

The Sixth Circuit found that the Board's rejection of the attributes of supervisory status identified in the statute was beyond its purview. It is not alone. As the Fourth Circuit has held, the statutory test for supervisory status is rampant with inconsistency in Board law:

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[3]In several other cases, the Board simply found that the assignment of duties by nurses were limited to the routine, established procedures, or dictated by routine patient needs, and thus not an expression of "independent judgment." *Leisure Hills Health Ctrs., Inc.*, 203 N.L.R.B. 326 (1973); *Madeira Nursing Ctr., Inc.*, 203 N.L.R.B. 323 (1973) overruled on other grounds, 217 N.L.R.B. 787 (1975); *Convalescent Ctr. of Honolulu*, 180 N.L.R.B. 461 (1969).



> So manifest has this inconsistency been, that a commentator ... aptly observed that "the Board has so inconsistently applied the statutory definition" of supervisor as to cause one to speculate "that the pattern of Board decisions ... displays an institutional or policy bias" ... as illustrated by a practice of adopting that "definition of supervisor that most widens the coverage of the Act, the definition that maximizes both the number of unfair labor practices findings it makes and the number of unions it certifies."

*St. Mary's Home v. NLRB*, 690 F.2d 1062, 1067 (4th Cir. 1982); *citing* Note, *The NLRB and Supervisory Status: An Explanation Of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1714, 1721 (1981).

**B. THE BOARD APPLIED AN INCORRECT STANDARD OF LAW IN FINDING THAT NURSE SUPERVISORS DO NOT EXERCISE AUTHORITY IN THE INTEREST OF THE EMPLOYER.**

It is undisputed that the statutory criteria for determining whether individuals are "supervisors" — which are well known — are to be read in the disjunctive. *Waverly-Cedar Falls Health Care Ctr. v. NLRB*, 933 F.2d 626, 529 (8th Cir. 1991). Hence, the existence of even one of the statutory indicia suffices to establish supervisory status. *St. Mary's Home*, 690 F.2d at 1066; *Jeffrey Mfg. Div. v. NLRB*, 654 F.2d 944, 950 (4th Cir. 1981); *NLRB v. Tio Pepe. Inc.*, 629 F.2d 964, 969 (4th Cir. 1980); *Albany Medical Ctr.*, 273 N.L.R.B. 485, 486 (1985). It is also settled "that *possession* alone of the requisite authority is sufficient to establish supervisory status," *St. Mary's Home*, 690 F.2d at 1066; *Jeffrey Mfg. Div. v. NLRB*, 654 F.2d at 950; *NLRB v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972).

Here, the record demonstrates that nurse supervisors possessed the requisite authority, and actually exercised it.

Specifically, the Board's decision turned principally upon its finding that the nurses' responsibilities primarily involve direct patient care. In that regard, the Board and the ALJ found that the

nurses': 1) assignment of work is routine and primarily concerned with patient care; 2) transfers of employees and grants of overtime are limited to considerations of patient care, id.; 3) adjusting of work schedules is only to repair conflicts which affect patient care, Id.; 4) authority in the disciplinary process does not extend beyond the realm of patient care; 5) participation in the resolution of grievances is motivated by patient care concerns; and, 6) participation in management meetings concerned discussions of responsibilities and skills required to ensure patient care. 13a, 36a.

### C. THE BOARD'S DECISION IS COMPLETELY INCONSISTENT WITH THE RECORD FACTS AND THE LAW.

The Board's non-statutory "patient care" amendment to Section 2(11) permeates the majority's decision below. It was the "basis" upon which the majority discounted the Nurse supervisors' authority to discipline, direct, evaluate, assign, and to resolve employee grievances. Under traditional statutory criteria, and numerous Board decisions in which those criteria have been applied in a health care context, the Board's analysis is faulty.

Again, any analysis of supervisory status must begin with the fundamental precepts that 1) the statutory criteria must be read in the disjunctive; *St. Mary's Home*, 690 F.2d at 1065-66; *Jeffrey Mfg. Div.*, 654 F.2d at 950; and 2) *possession alone* of any statutory indicia is enough to establish supervisory status. NLRB v. Magnesium Casting Co., 427 F.2d 114 (1st Cir. 1970), *aff'd* 401 U.S. 137 (1970). Hence, a finding by this Court that Respondent's nurse supervisors *possess* any one of the statutory criteria – whether or not that authority is actually exercised – compels the conclusion that they are supervisors under the Act.

The presence or absence of other supervisors has long been a significant factor in supervisory status determinations. Here, if the nurse supervisors are not statutory supervisors, Respondent — a nursing home responsible for the total care of more than 100 aged and infirm residents — would be without a single on-site representative of management up to 76% of the time (40 out of 168 hours/week). 46a. This, of course, is a manifestly untenable



situation as even the ALJ noted, yet it is precisely the finding of the Board. This pattern of inconsistency has been recognized. *See Waverly-Cedar*, 933 F.2d at 631 (concurring opinion).

The Board found that during nights and weekends, the nurse supervisors are the highest ranking personnel in the Home. 46a. Yet, the Board cavalierly dismisses the clear import of the nurse supervisors' complete control of the facility as unpersuasive. The Board's failure to address this reasoning is baffling.

## CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court affirm the decision of the Sixth Circuit.

Respectfully submitted,

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No. 92-1964

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

vs.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

### CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

### INTEREST OF THE AMICUS CURIAE

The American Health Care Association ("AHCA") is an organization of thousands of nursing care facilities throughout the United States. The AHCA is deeply concerned about the issue in this case – that the National Labor Relations Board

("the NLRB" or "the Board") has applied an incorrect interpretation of the definition of "supervisor" under the National Labor Relations Act ("the Act"). The Board's "patient care proviso," discussed below, has made it virtually impossible for the AHCA's member facilities to have the loyal supervisory staffs long inherent in the Act's statutory scheme. The Court's opinion in this case will therefore potentially affect each of the AHCA's member facilities.

## SUMMARY OF ARGUMENT

Section 2(11) of the National Labor Relations Act provides a clear definition of "supervisor." 29 U.S.C. 152(11). The statute provides twelve indicia of supervisory authority, the possession of any one being sufficient to establish supervisory status.

Notwithstanding clear statutory language, the Board has created a new legal standard to be applied *only* in the context of health care. There is no justification for such an extra-statutory legal standard, either as a matter of law *or* policy.

When Congress enacted Section 2(11) in 1947, it was mindful that, by virtue of greater skill and experience, certain employees might appear to have greater authority than coworkers. These individuals (often referred to as "lead men" or "straw bosses") might appear to some to be minor "supervisors." Congress made it clear that these individuals did not satisfy the statutory criteria for supervisory status. The Board's decision adhered to this concept.

In 1974, Congress enacted the Health Care Amendments to the National Labor Relations Act. At that time, the American Nurses Association ("the ANA") (and other labor organizations) lobbied Congress to specifically exclude from the ambit of Section 2(11) those activities of nurses that pertained to patient care. Congress specifically declined to do so, noting with approval the Board's application of the traditional "straw boss" analysis to the health care industry. Congress directed the Board to continue to interpret the statute accordingly.



In the aftermath of the 1974 amendments, the Board began to depart from the traditional analysis and create new standards to be applied only in the health care industry. This new approach emerged gradually, and was formally identified only after repeated urgings by courts of appeals. The Board has admitted, as recently as several days ago, that it has created a separate rule of law for the health care industry. Indeed, after the Board submitted its brief to this Court in this matter, it actually *overruled* landmark pre-1974 cases to which *Congress directed the Board to adhere.*

The Board's current approach is an insupportable departure from the clear language of the statute — one which singles out health care as the only industry for which higher standards must be met to establish supervisory status. Such an approach is inappropriate as a matter of law. It also has very unfortunate policy ramifications. Nursing homes care for a large number of aged and infirm individuals. The need for accountable supervision of primary care givers should be self-evident. The effect of the Board's extra-statutory rule has been to deprive many nursing homes of on-site first line supervision.

Finally, should this departure by the Board be condoned, the way would clearly be paved for the Board to grant non-statutory exemptions from Section 2(11) to unions and interest groups seeking to represent first-line supervisors in other industries.

## ARGUMENT

### A. The Board Has Departed From The Traditional Statutory Standards That Congress Intended To Govern Supervisory Status Determinations

As originally enacted, the Act contained no definition of "supervisor." Act of July 5, 1935, ch. 372, 49 Stat. 449. Recognizing that "*management, like labor, must have faithful agents,*" H.R.Rep. 245, 80th Cong., 1st Sess. at 16 (1947) (emphasis in original), Congress, as part of the Taft-Hartley Amendments in 1947, enacted a statutory exclusion for supervisors. Labor Management Relations Act, Ch. 120, Title I, 61 Stat. 137-138

(codified at 29 U.S.C. 152(3)).[1] Under the Act, a "supervisor" is defined as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §152(11).[2]

Congress recognized that corporate "personnel departments" were often responsible for carrying out actions that bore upon the statutory criteria. Hence, the duty to utilize independent judgment in the direction of employees was considered an important factor by which to evaluate the status of first-line supervisors.[3] The words "or responsibly to direct" employees were specifically added to the statute in recognition of management

[1] Congress foresaw that the loyalty of managers may be "divided" if both supervisors and employees were unionized. H.R. Rep. 245, 80th Cong., 1st Sess., at 16 (1947). Congress also recognized divided loyalty could interfere with the assignment of "people to their work, to see they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, . . ." *Id.*

[2] The Board has repeatedly stated that the statutory indicia set forth in Section 2(11) of the Act must be read in the *disjunctive*. *Albany Medical Center Hospital, 273 NLRB 485, 486 (1984); Newspaper Guild, Local 187 (Times Publishing Co.)*, 196 NLRB 1121, 1122 (1972), *modified on other grounds*, 489 F.2d 416 (3d Cir. 1973). Therefore, *"only one need exist to confer supervisory status."* 273 NLRB at 486 (emphasis added). Moreover, under Board law, the mere *possession* of supervisory authority — whether or not it is actually exercised — satisfies the statutory criteria. *Atlanta Newspapers*, 263 NLRB 632 (1982); *Exeter Hospital*, 248 NLRB 377, 378 (1980).

[3] 93 CONG. REC. 4804 (statement of Sen. Flanders), *reprinted at* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1303 (1947).



custom.[4] Congress intended that individuals exercising such "responsible direction" would be "above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees.'"[5]

The "straw boss analysis" does not involve a separate "test" or legal standard.[6] It simply is recognition of a common situation typically involving employees who achieve a certain status by virtue of having "moved up through the ranks", but *do not satisfy the statutory definition of "supervisor."* A "straw boss" therefore is *not* an "exception" to the supervisory criteria set forth in Section 2(11); rather, he or she is one who perhaps *comes close* to satisfying the statutory criteria but does not.

Contrast this with the Board's current approach to supervisory status in health care. The Board has stated that if

> some authority exists which in other contexts would be found to bestow supervisory status, *the qualitative nature of this authority must be subjected to a second-step analysis* in order to determine the ends for which

[4] *Id.*

[5] *Id.*

[6] Congress understood that the individual who satisfies the statutory definition must be distinguished from the "straw bosses, leadmen, set-up men, and other minor supervisory employees". S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947). The minimal authority of a "lead person" or "straw boss" typically derives from greater training, skill or experience, and was not truly "supervisory" in nature. 93 CONG. REC. 4804 (statement of Sen. Flanders), *reprinted at* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, 1303 (1947). Indeed, before *and* after the Taft-Hartley Amendments, the Board recognized that individuals whose authority arose merely from greater skill or experience were not truly "supervisory." *See Bethlehem - Sparrows Point Shipyard, Inc.*, 65 NLRB 284 (1945); *Pittsburgh Equitable Meter Company*, 61 NLRB 880 (1945); *Richards Chemical Works, Inc.*, 65 NLRB 14 (1945); *Endicott-Johnson Corp.*, 67 NLRB 1342, 1347 (1946); *George Ehlenberger & Co.*, 77 NLRB 701, 703 (1948); *Greystone Knitwear Co.*, 136 NLRB 573 (1962), *enf'd*, 311 F.2d 794 (2d Cir. 1963); *Becker County Sand & Gravel Co.*, 157 NLRB 557 (1966), *enf'd*, 373 F.2d 528 (4th Cir. 1967).

> it is exercised. Thus, *acts which would ordinarily be supervisory may, in the health care context, indicate no more than the exercise of technical or professional judgment.*

*Beverly Manor Convalescent Centers*, 275 NLRB 943, 946 (1985) (emphasis added). Clearly, the Board created a new test *specifically for health care*. It has done so despite repeatedly acknowledging that it is required to apply the "traditional standards," and the "straw boss" doctrine. *Id.* at 946-947. Moreover, the Board wrongly stated this new test was a "dictate of congressional intent." *Id.* As discussed below, nothing could be further from the truth.

### B. In 1974 Congress Affirmatively Refused To Amend Section 2(11) To Exclude Nurses From The Definition Of "Supervisor"

In the debates that culminated in the 1974 amendments to the Act (the "Health Care Amendments"), various interest groups urged Congress to amend Section 2(11) to specifically exclude nurses and other health care professionals. Under a proposal urged by the American Nurses Association, "[a] registered nurse *should not be deemed a supervisor when exercising independent professional judgment.*" *Coverage of Nonprofit Hospitals Under The National Labor Relations Act, 1972: Hearings on H.R. 11357 Before The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d sess. 19 (1972) ("Senate Hearings on H.R. 11357") (emphasis added); *see also Extension Of NLRA To Nonprofit Hospital Employees: Hearings On H.R. 1236 Before The Subcommittee On Labor Of The House of Representatives Committee on Education And Labor*, 93d Cong., 1st sess. 18 (1973).

The amendment proposed by the ANA was rejected.[7] The Senate Committee that reported out the bill which ultimately passed, explained:

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[7] Here, the ANA asserts that in the 1972 hearings before the House of Representatives, the ANA urged Representatives Ashbrook and Thompson (co-sponsors of the bill) to amend Section 2(11) specifically to eliminate registered nurses, *(Footnote continued)*



> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals such as registered nurses, interns, residents, fellows, and salaried physicians and *concludes that the proposed amendment is unnecessary because of existing Board decisions.* The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee *expects the Board to continue evaluating the facts of each case in this manner when making its determinations.*

S. Rep. No. 766, 93d Cong., 2d sess. 6 (1974)(emphasis added). Congress thus specifically rejected efforts to amend Section 2(11), and was satisfied that Board law in 1974 accurately reflected congressional intent. Moreover, Congress expressly directed the Board to *continue to utilize the same principles it had always applied* in considering supervisory status in the health care industry.

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because registered nurses' patient care responsibilities *include* the necessary direction and assignment of others' work. Senate Hearings on H.R. 11357 at 17-18; ANA Brief at 9-12. Representative Thompson assured the ANA that even *absent* an amendment specifically exempting "registered nurses" from Section 2(11), the concerns of the ANA would be addressed. *Id.*

The short answer to this contention is: (1) the statutory language was *not* amended, and (2) the Board was directed to continue to apply the "straw boss" standard that it applied to all other industries. As discussed *infra* at pp. 13-19, the Board has failed to follow the direction of Congress and has instead administratively amended the Act.

Several important points emerge from the foregoing legislative history. First, the above-quoted portions of the 1974 Senate Report are the only express statements of congressional intent concerning the specific issue of supervisory status of health care professionals. There simply is no basis for the elaborate statements by the Board that purport to reflect "congressional intent." *See* Board Brief at 16-22; *Beverly Manor Convalescent Centers*, 275 NLRB at 945-946.

Second, to the extent that congressional intent may be *inferred* from the Health Care Amendments, the inferences do not support the Board's construction of Section 2(11). Indeed, by axiom of statutory construction, Congress clearly did *not* intend the Board to adopt as a rule of law a proposed amendment that Congress considered and *specifically rejected*. Yet, that is precisely what the Board has done.

Third, the Board ignores completely the congressional direction that it continue to make supervisory status determinations in the health care industry in the same case-by-case manner that it had prior to 1974. Incredibly, after the Board briefed the instant case, the Board actually *overruled* pre-1974 cases which Congress stated *accurately reflected legislative intent*. *See* pp. 19-20, *infra*. The pre-1974 cases, discussed below, make it clear that the Board has misconstrued Section 2(11) and congressional intent.

### C. Before 1974, The Board Applied The Well-Established "Straw Boss" Standard In The Health Care Industry

In light of the foregoing, the "existing Board decisions" which Congress assessed when it decided against amending the Act in 1974 are worthy of examination. As discussed below, those cases applied the traditional "straw boss" analysis to the health care industry. They did *not* create a *new* standard which rendered non-supervisory in health care individuals who clearly would be supervisors in any other industry. There simply was no "special rule" for health care or for nurses.



#### 1. The Direction By Nurses Of Employees In The Care Of Patients Was Held By The Board To Satisfy Section 2(11)

Before 1974, the NLRB held that supervising the work of nurses aides in the administration of patient care services qualified an LPN as a supervisor under the Act. *University Nursing Home, Inc.*, 168 NLRB 263 (1967). There, the Board found a Licensed Practical Nurse ("LPN"):

> supervises the work of three nurses' aides and one orderly in the performance of tasks of changing bed linens, bathing, feeding, massaging, and otherwise caring for patients in accordance with physicians' instructions .... She also carries out such orders and treatments as patients' doctors may prescribe .... As a charge nurse, [the LPN] reviews patients' charts to make certain that proper medications and diet have been and are being given, and observes and reports symptoms, if any to the head registered nurse. *We find that the licensed practical nurse is a supervisor within the meaning of the Act.*—

*Id.* at 265 (emphasis added).

*Assigning patient care duties* to nursing assistants was also indicative of supervisory status. *Autumn Leaf Lodge*, 193 NLRB 638, 638-639 (1971), *enf'd sub. nom. NLRB v. National Living Centers, Inc.*, 462 F.2d 575 (5th Cir. 1972). The Board also recognized that a nurse with the responsibility to direct non-supervisory personnel was a supervisor. *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) *overruled, Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at n.12 (Nov. 26, 1993). Assigning employees to patient rooms and designating the care to be given reflected supervisory authority. *North Dade Hospital, Inc.*, 210 NLRB 588, 592 (1974). These findings were not inadvertent. Indeed, the Board specifically explained *why* such duties were supervisory:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require

variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely. . . . Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules . . . is compelling evidence that their direction and assignment of employees is substantial and meaningful. . . .

[E]ach of the . . . nurses concerned was at all material times a supervisor, as defined in Section 2(11) of the Act because she had authority in the interest of the [employer] to "assign" and "responsibly to direct" other employees, as comprehended by that section.

*Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972), *enf'd*, 490 F.2d 1384 (6th Cir. 1974),[8] *overruled, Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at n.12.

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[8] Before the Health Care Amendments, the Board recognized that nurses' involvement in other "supervisory" functions under Section 2(11) established supervisory status, regardless of their connection to patient care. These included recommending employees for termination, *North Dade Hospital, Inc.*, 210 NLRB at 592; *Autumn Leaf Lodge*, 193 NLRB at 639; the power to discipline employees, *Rosewood, Inc.*, 185 NLRB 193, 194 (1970); the authority to enforce rules, and to "write up" nursing assistants for violations, *Avon Convalescent Center, Inc.*, 200 NLRB at 706; the ability to transfer employees to different jobs, *Autumn Leaf Lodge*, 193 NLRB at 639; *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969); the authority to permit employees to leave early, *New Fairview Hall Convalescent Home*, 206 NLRB 688, 749 (1973), *enf'd sub nom. Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), *Rosewood Inc.*, 185 NLRB at 194; excuse lateness, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; adjust schedules or assign meal and break periods, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; *Avon Convalescent Center, Inc.*, 200 NLRB at 706; adjust time cards, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; the authority to call in employees to ensure staffing, *Garrard Convalescent Home, Inc.*, *(Footnote continued)*



### 2. Before 1974, Where The Board Held That Nurses' Direction Of Employees Was Not "Supervisory", It Applied The Correct Standard; One Which Differs Fundamentally From The One Utilized Today

In but *one* case prior to 1974 — and indeed, three years *before* the above quote in *Avon Convalescent Center* — did the Board find that nurses were *not* supervisors because their duties were "solely a product of highly developed professional skills." In that case, the Board found that the nurses' authority was simply "to inform other, lesser skilled employees as to the work to be performed for patients." *Sherewood Enterprises, Inc.*, 175 NLRB at 354. The "authority" of the nurse was therefore analogous to that of the non-supervisory "lead person" or "straw boss." *See also, Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950, 951-952 (1970).[9]

The Board asserts here that its decision in *Doctors' Hospital of Modesto, Inc.*, was the "seminal" case creating its current test for supervisory status in the health care industry.[10] Board Brief

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199 NLRB 711, 717 (1972), *enf'd*, 489 F.2d 736 (6th Cir. 1974), *Rockville Nursing Center*, 193 NLRB at 962; and the preparation of employee evaluations. *New Fairview Hall Convalescent Center*, 206 NLRB at 749; *Sherewood Enterprises, Inc.*, 175 NLRB at 354. Where nurses adjusted employee grievances, they were deemed supervisors. *New Fairview Hall Convalescent Center*, 206 NLRB at 749. Higher pay than other employees was considered an indicia of supervisory status. *Sherewood Enterprises, Inc.*, 175 NLRB at 354. Where nurses were the highest ranking persons in the facility, the Board recognized them as supervisors. *Rockville Nursing Center*, 193 NLRB at 717; *Autumn Leaf Lodge*, 193 NLRB at 638-639. Nurses who attended in-service meetings concerning their supervisory duties were also considered supervisors under Section 2(11). *Avon Convalescent Center, Inc.*, 200 NLRB at 705.

[9] The Board also held a nurse was actually a "leadwoman" in *Abingdon Nursing Center*, 189 NLRB 842, 850 (1971) *enf'd*, 80 L.R.R.M. (BNA) 3232 (7th Cir. 1972).

[10] The Board implies that *Doctors' Hospital of Modesto, Inc., supra*, and *Sherewood Enterprises, Inc., supra*, are different cases. Board Brief at 17. In *(Footnote continued)*

at 17. This simply is not accurate. As the Ninth Circuit, on review of *Doctors' Hospital of Modesto, Inc.*[11] noted the Board simply applied the traditional "straw boss" analysis in the health care field:

> The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is *not necessarily* a part of management and a "supervisor" within the Act. The fact that nurses are highly trained professionals and occasionally use independent judgment does *not necessarily* make them part of management or "supervisors" under the Act.

*NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d at 776 (emphasis in original; citations omitted). The Board's assertion that *Doctors' Hospital* was the genesis of its current test, Board Brief at 17-20, is therefore simply wrong.

The overwhelming weight of pre-1974 Board law establishes that the NLRB evaluated supervisory cases in the health care industry according the traditional indicia applicable to any other industry. No pre-1974 case even suggests that the Board should apply any higher level of "scrutiny," or undertake any investigation of "motive," when making supervisory status determinations in the health care industry. Nor does any case even permit

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fact, they were two separate episodes of litigation over the supervisory status of several classes of employees in the same hospital, arising from the same Board election. *Sherewood Enterprises, Inc.*, litigated the status of certain nurses before the Board election, and *Doctors' Hospital* litigated the status of other nurses after the same election. There is no "rule" to be drawn from the Board's holding in one case that one set of nurses' duties were truly supervisory and its holding in the other case involving a different set of nurses, with different responsibilities, were not.

[11] *NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772 (9th Cir. 1973), *enforcing, Doctors' Hospital of Modesto, Inc.*, 193 NLRB 833 (1971). The 1971 *Doctors' Hospital of Modesto, Inc.*, case was the third episode of litigation to arise from the Board's failure to find nurses to be supervisors at that hospital. This case was an unfair labor practice proceeding regarding the employer's refusal to bargain with the Union, based, *inter alia*, on the Hospital's continued contention that the nurses at issue were supervisors.



the *inference* that activities "incidental to" or "in connection with" patient care should be outside the parameters of Section 2(11).[12]

The AHCA does not argue that nurses employed at nursing homes must be supervisors in every instance. The AHCA asserts that Section 2(11) must be applied to the health care industry and to nurses in the same manner as it is applied in any other case involving supervisory status in any other industry.

### D. The Board's New Standard For Supervisory Status In The Health Care Industry Is Inconsistent With Congressional Intent And Makes It Virtually Impossible For Nurses To Be Deemed Supervisors

Shortly after the 1974 amendments, the Board began to apply gloss after gloss of "construction" on Section 2(11). The ultimate result has been the creation of an extra-statutory "rule" under which the Board deems non-supervisory any activity undertaken by nurses which has any impact on patient care. *See* pp. 5-6, *supra*. As applied, the Board's "patient care proviso" has resulted in nurses *not* being held supervisory while similarly situated individuals in other industries would be so found.

By 1978, the Board had begun its departure from the Congressional standard and developed a special legal rule for the

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[12] In several other pre-1974 cases, the Board found that nurses were not supervisors under the Act. However, the bases for these holdings had nothing to do with the higher level of scrutiny increasingly applied by the Board after 1974. In those cases, the Board based its finding on the simple absence of authority over employees, *Garden of Eden Nursing Home, Inc.*, 199 NLRB 16, 23 (1972), *overruled on other grounds, Madiera Nursing Center, Inc.*, 203 NLRB 323 (1973); *Jackson Manor Nursing Home*, 194 NLRB 892, 896 (1972), *overruled on other grounds, Madiera Nursing Center, Inc., supra*; or that the nurses used no independent judgment, *Madiera Nursing Center, Inc.*, 203 NLRB at 324, *Convalescent Center of Honolulu*, 180 NLRB 461 (1969), *New Fern Restorium Co.*, 175 NLRB 871 (1969), or that the nurses' direction of employees was routine. *Mountain Manor Nursing Home*, 204 NLRB 425, 426 (1973), *Leisure Hills Health Centers Inc.*, 203 NLRB 326 (1973), *Eugene Good Samaritan Center*, 191 NLRB 35, 39 (1971), *enf'd sub nom. NLRB v. Evangelical Lutheran Good Samaritan Society*, 477 F.2d 297 (9th Cir. 1973).

health care industry. In fact, one NLRB Administrative Law Judge ("ALJ") observed that

> In light of [the 1974 amendments' legislative history], *the Board has declined to accord supervisory status to nurses — in the face of evidence which in other types of situations might very well support a contrary conclusion, because such directives were incidental to an exercise of professional expertise.*

*Turtle Creek Convalescent Centres, Inc.*, 235 NLRB 400, 402-403 (1978)(emphasis added; footnote excluded). The Judge then discussed the manifold ways the Board found to discount the otherwise-supervisory activities of nurses.[13]

[13] In support of this observation, ALJ Walter Maloney cited *Sutter Community Hospitals of Sacramento, Inc.*, 227 NLRB 181 (1976) (nurses wrote counseling memoranda or evaluations, maintained records, ordered supplies, and effectively recommended hiring); "[n]one of these factors, nor the aggregate thereof, were sufficient in the Board's view to remove the employees in question from the protection of the Act." *Turtle Creek Convalescent Centres*, 235 NLRB at 402; *Shadescrest Health Care Center*, 228 NLRB 1081 (1977); "Despite the fact that charge nurses were the highest ranking persons in the premises in the nursing unit during evenings and weekends, the Board felt that this factor was not sufficient to warrant a conclusion that charge nurses were supervisors . . ." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Brattleboro Memorial Hospital, Inc.*, 226 NLRB 1036 (1976)(nurses evaluated employees, assigned work, adjusted grievances, authorized overtime, called in employees, issued written reprimands); "[t]he Board majority felt that all of these indicia of supervisory authority . . .did not add up to a conclusion that head nurses were supervisors within the meaning of the Act, since their judgments were made almost exclusively as a result of their professional capacity and incidental to the care of patients." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Pinecrest Convalescent Home, Inc.*, 222 NLRB 13 (1976)(nurses were often highest ranking persons, called in employees, authorized employees to leave early); "[d]espite these factors, the Board stated that the charge nurses therein were employees . . ." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Victor Valley Hospital*, 220 NLRB 977 (1975)(nurses assigned work, could give verbal reprimands, attended supervisory meetings, approved overtime, evaluated employees); "[h]owever, the Board felt that these powers were an outgrowth of their professional standing and not an indication of supervisory authority." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; and *Oak*

*(Footnote continued)*



The Sixth Circuit identified the Board's "patient care proviso" in 1981. In *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), the Sixth Circuit remanded a case to the Board because it appeared that nurses were denied supervisory status "simply because their supervisory activities in assigning and directing" employees were related to patient care. The Court correctly said "*this approach has no reasonable basis in the law.*" *Id.* at 1103. (emphasis added).

On remand, the Board paid lip service to the "straw boss" rationale, but ultimately ignored it. *Beverly Manor Convalescent Centers ("Beverly Manor I")*, 264 NLRB 966, (1982), *enf. denied*, 727 F.2d 591 (6th Cir. 1984). The Board said that Section 2(11) required *more* authority than actions fundamentally limited to patient care. 264 NLRB at 966-967. Moreover, said the Board, even though assignment and direction of employees *are* supervisory indicia under Section 2(11), if such activities are

*Ridge Hospital of the United Methodist Church*, 220 NLRB 49 (1975) (nurses were often the highest ranking persons in the facility, assigned and reassigned employees, could verbally correct employees who were guilty of misconduct); "[t]he Board found . . . that the occasional exercise of supervisory authority does not serve to transfer an employee into a supervisor . . ." *Turtle Creek Convalescent Centres*, at 403.

On appeal, the Board in *Turtle Creek Convalescent Centres* stridently *denied* that it applied different standards to nurses, 235 NLRB at 400, disavowing the notion that "the Board, in determining the supervisory status of health care professionals, applies standards which are different from the traditional standards for determining supervisory status." *Id.* The Board continued, citing its statement in *Sutter Community Hospitals of Sacramento, Inc.*, that "[i]n deciding whether health care professionals, including registered nurses, are supervisors within the meaning of the Act, *we are bound to adhere to the traditional standards for determining supervisory status.*" *Id. at n.3 (emphasis added).*

ALJ Maloney took the foregoing statement seriously when, in *Springfield Jewish Nursing Home for the Aged, Inc.*, 292 NLRB 1266 (1989) he applied the "traditional standards" to nurses. Specifically, he found the nurses' assignment and conveyance of employer policies to employees regarding patient care satisfied Section 2(11). *Id.* at 1272. However, the Board again reversed the Judge, holding, *inter alia*, that "assignment and direction" "regarding patient care does not confer supervisory status on a charge nurse." *Id.* at 1267.

incidental to patient care, they are *not* in the interest of the employer. *Id.*

The Board also departed from the statute by stating that a nurse's judgment need no longer be manifest in activities reflecting the *nurse's treatment of patients*, but merely in relation to the care of patients *generally*. The Board ultimately held that the nurses were not supervisors because their "judgments . . . primarily foster patient care and not the personnel policies of the employer." *Id.* at 968.

Dissatisfied, the Sixth Circuit again remanded the case, pointedly directing the Board to answer these questions: (1) do nurses exercise independent judgment when engaged in supervising employees? (2) If so, is such activity in the interest of the employer? *Beverly Enterprises v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984). The Board admitted that nurses' assignment and direction duties do utilize *independent judgment*. *Beverly Manor Convalescent Centers ("Beverly Manor II")*, 275 NLRB 943 (1985). At that point, the Board articulated the current two-step analysis that it employs to effectively preclude nurses from supervisory status. *See* pp. 5-6, *supra*.[14].

The *Beverly Manor* cases crystallized the Board's two-pronged attack on the potential supervisory status of nurses. The Board first imposes an extra-statutory hurdle for nurses (the "two-step analysis"). It then excludes from Section 2(11) any supervisory authority which results in an employee act which may be said to further patient care. This is neither the Act, nor application of the "straw boss" standard to health care.

In the aftermath of *Beverly Manor II*, the Board has extended this "patient care proviso" well beyond the assignment and

[14] The Sixth Circuit did not have an opportunity to comment on *Beverly Manor II*. However, shortly thereafter, the court reviewed another Board determination in which the Circuit unequivocally answered a question that the Board avoided in *Beverly Manor II*: "patient care" is the "interest" of a health care employer. *NLRB v. Beacon Light Christian Nursing Home* 825 F.2d 1076 (6th Cir. 1987).



direction of work. It has extended this analysis to all supervisory indicia under Section 2(11).

For example, in *Ohio Masonic Home, Inc.*, 295 NLRB 390 (1989), the Board characterized an employee's refusal of direction by a nurse as "causing potential danger to [a] patient." Thus, the nurse's *subsequent suspension* of the employee was dismissed as merely "incidental to the treatment of [a] patient." *Id.* at 394. The suspension for endangering a patient was deemed not to reflect "the interest of the Employer in enforcing personnel policy." *Id. See also, Phelps Community Medical Center*, 295 NLRB 486 (1989).

In *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390 (1989), *enf'd*, 933 F.2d 631 (1991), the Board held that "connection to patient care" is a factor which defeats any supervisory quality with respect to suspension of employees. 297 NLRB at 392-93. In fact, where the incident "could have affected the quality of patient care," the nurse's independent response could not be supervisory. *Id.* In *Beverly Enterprises-Pennsylvania, Inc.*, 303 NLRB No. 20 (1991), *enf. denied sub nom., Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992), the Board held that nurses who 1) are in charge of a facility 75% of the time, 2) counsel and discipline employees, and 3) are directed by management to supervise and discipline employees, are *not* supervisors because all of those functions related to "patient care" concerns. *Beverly Enterprises-Pennsylvania, Inc.*, 6-RC-10518 (Decision and Direction of Election at pp. 10-16) (Nov. 16, 1990).

The Board's erosion of Section 2(11) as applied to nurses was manifest in its decision in *Riverchase Health Care Center*, 304 NLRB 861 (1991), *enf. denied sub nom. Beverly California Corp. v. NLRB*, Nos. 92-1068, 92-1205 (4th Cir. 1992) (unpublished opinion). There, the Board discounted almost every supervisory function of the LPNs by simply mentioning that each quality had some patient care impact, whether direct or indirect — and regardless of whether the care was administered by the *nurse* herself (as contemplated by Congress) or by employees pursuant to her supervision.

The *Riverchase Health Care Center* Board stated that the LPNs' *assignment and direction of work* was "primarily concerned with patient care." 304 NLRB at 864. Their elaborate and documented *disciplinary* responsibility did "not extend beyond the realm of patient care." *Id.* at 864-865. The *authorization of overtime* was "limited to considerations of routine patient care." *Id.* at 864. *Transfers of employees* were "directly motivated by the day-to-day requirements of patient care *rather than the business interests of the Employer*. . . ." *Id.* (emphasis added). LPNs' *adjustment of schedules* was to remedy situations "which affect patient care." *Id.* The *rescheduling of employee breaks* was merely "to ensure adequate staff is available to care for the patients." *Id.* at 863-864. *Releasing employees from work* was "consistent with the dictates of patient care." *Id.* at 864. The LPNs' *participation in the grievance process* was "motivated by patient care concerns." *Id.* at 865. Ultimately, the very management meetings attended by LPNs to *enhance their supervisory skills and promote compliance with their supervisory responsibilities* were dismissed as "meetings and training sessions where they discussed responsibilities and skills required to ensure patient care." *Id.*

In short, by uttering the words "patient care," the Board has eviscerated virtually every supervisory attribute possessed by a nurse.

*Riverchase Health Care Center* illustrates how far the Board's analysis has strayed from Congressional intent. It is the proverbial "absurd result" reached by taking the "patient care exclusion" to its "logical conclusion." Indeed, the conclusion appears inescapable that the Board has made a policy judgment that nurses *should* be unionized, or at least union-eligible.[15]

[15] Indeed, the Fourth Circuit has noted with approval one commentator's explanation for the rampant inconsistency in Board decisions regarding supervisory status:

> So manifest has this inconsistency been, that a commentator . . . aptly observed that "the Board has so inconsistently applied the

*(Footnote continued)*



Here, while asserting that it has conformed to congressional expectations, even the Board appears to acknowledge that it has created a new standard, beyond the traditional "straw boss" analysis. Under this standard, any direction or assignment of employees having anything to do with patient care is simply *disregarded*.

### E. The Board Has Admitted - After Its Brief Herein Was Filed - That It Has Created A New Standard For Health Care And That This Standard Conflicts With Congress' 1974 Directive

The Board has stated and restated its various glosses, reinterpretations, and bases for the "patient care proviso" on so many occasions, that it is quite unclear what its position actually is. ALJ Maloney could not decipher the Board, nor could the Sixth Circuit. In a decision dated November 26, 1993, the Board issued a comprehensive restatement of the law on the "patient care proviso." *Northcrest Nursing Home*, 313 NLRB No. 54 (Nov. 26, 1993). In *Northcrest Nursing Home* the Board *admits* that it has *de facto* amended Section 2(11).

The Board continues to assert that it is applying the same statutory interpretation it used before 1974 - pursuant to the direction of Congress. *Northcrest Nursing Home*, 313 NLRB No.

> statutory definition" of supervisor as to cause one to speculate "that the pattern of Board decisions . . . displays an institutional or policy bias" . . . as illustrated by a practice of adopting that "definition of supervisor that most widens the coverage of the Act, the definition that maximizes both the number of unfair labor practices findings it makes and the number of unions it certifies."

*NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1067 (4th Cir. 1982), *citing* Note, *The NLRB and Supervisory Status: An Explanation Of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713-14, 1721 (1981). The Fourth Circuit's agreement with the above commentator prompted it to hold that *"courts must carefully scrutinize the Board's findings and the record on supervisory status."* *St. Mary's Home, Inc.*, 690 F.2d at 1067 (emphasis added). *See also Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983).

54, slip op. at 3. The Board then ignores that assertion by conceding that it "has utilized the 'patient care' analysis" only "since 1974." *Id.* (emphasis added).

Moreover, the Board today *admits* that:

> Prior to the 1974 Health Care amendments, the Board had found supervisory status based on assignment and direction in *Avon Convalescent Center*, and *Rockville Nursing Center*. Charge nurses in these cases were found supervisory because they utilized their professional judgment in assigning and directing other employees. These cases are not consistent with the Board's current holdings which do not find supervisory status on this basis. Accordingly, these cases are *overruled*.

313 NLRB No. 54, slip op. at n.12 (emphasis added, citations omitted).[16]

The significance of this passage cannot be overstated. Congress reviewed the state of Board decisional law in 1974 when it decided *not* to change the Act's definition of supervisor. Congress specifically expressed its *agreement* with the mode of analysis employed by the Board up until that time. It further directed the Board to *continue* to evaluate the cases in the same manner. *See* pp. 6-7, *supra*.

Now, while professing adherence to congressional intent, the Board in *Northcrest* says that the very decisions to which Congress directed it to adhere in the aftermath of the Health Care Amendments are *wrong!* Such sleight-of-hand abrogates any

[16] The Board presently attempts to repair this blatantly *ultra vires* interpretation by re-characterizing its past decisions, stating that its "imprecise" use of "terminology" only made it *appear* that it rejected discipline, or other overtly supervisory qualities simply by applying the appellation "patient care." 313 NLRB No. 54, slip op. at 4, 8. The Board now re-writes these cases, telling us that the "real reason" such individuals were not held to be supervisors is some reason other than what it expressly held in those cases. *Id.* at 4.



claim that the Board's interpretation of the Act is entitled to judicial deference. It also shows that the Board's "patient care proviso" has no basis in law.

Congress directed the Board to *apply* the law of these cases, not to *overrule* them.[17]

### F. Nothing In Section 2(12) Of The Act Alters The Supervisory Standards Of Section 2(11)

The Board relies heavily on Section 2(12) of the Act to buttress its claims. Section 2(12), passed along with Section 2(11) in 1947, sets forth a definition of "professional employees." This is a true diversionary tactic, for the *LPNs* at issue in this case — and most other nursing home cases — are *technical, not* "professional" employees under the statute. (*Registered nurses* are "professional employees" within the meaning of Section 2(12).) *See* pp. 22-23, *infra*.

Even if professional employees *were* at issue here, no serious contention may be made that the statutory definitions of "supervisor" and "professional" are mutually exclusive. Standing alone, an individual's possession of professional qualifications simply cannot mean that he or she *may not*, as a matter of law, *also* have supervisory authority with respect to subordinate employees. While individuals who are not professionals may indeed be statutory supervisors, there is no basis whatever for the inescapable conclusion of the Board's and ANA's logic — *i.e.*,

[17] The *Northcrest Nursing Center* Board also argues that because nurses promote the interests of the *patient* in quality care, there will "seldom" be any "risk" of conflicting loyalties on the part of the nurses between the interests of the "employees" and the employer. 313 NLRB No. 54, slip op at 3. Among other things, this ignores the reality of union activity in the health care industry. Unions have loudly argued on behalf of their own "patient care" agenda, urging, for instance, increased staffing. It is not difficult to envision a supervising nurse placing a union's interest above the employer's, by not exercising his or her supervisory authority to compel employees to satisfy the work standards established by the employer, and thereby attempting to compel the employer to increase staffing.

that it is *easier* for *non*-professional employees to satisfy the Act's definition of supervisor than it is for professional employees.[18]

Indeed, the short answer to the "professional"/ "supervisor" issue raised by the Board and ANA was given by this Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, this Court stated that "professionals, like other employees, may be exempted from coverage under the Act's exclusion for 'supervisors.'" 444 U.S. at 681-682. *Yeshiva* contained no statement or even implication that some test other than the traditional "straw boss" analysis should be applied in the context of putative supervisors who happen to be professionals.

### 1. The Nurses At Issue Below Are Not "Professional Employees"

As noted, the Board has long held that LPNs such as these at issue here, 987 F.2d 1256, 1258-59 are not "professionals," *Mountain Manor Nursing Home*, 204 NLRB at 426, and are at most, "technical" employees, *not* "professionals." *Barnert Memorial Hospital Center*, 217 NLRB 775 (1975). Much of the Board's argument — and indeed *all* of the pertinent directives of Congress cited by the Board and *amici* herein — concern only *professional* employees. When confronted with this inconvenient fact in the past, the Board simply *ignored* the distinction by stating that the judgments made by "technical" employees were "similar" to those made by "professionals." *Beverly Manor I*, 264 at 966 n.4 (1982). This assessment has absolutely no statutory basis. Moreover, the Board's facile inclusion of LPNs as "professional employees" is directly contrary to congressional intent.

[18] The Board's contention that Section 2(12) limits the application of Section 2(11) is also directly contrary to the expressed intent of Congress. Indeed, the Senate Report describes as the "significance" of Section 2(12) its relation to "section 9 [29 U.S.C. 159] which is amended by the committee bill to require separate voting units of professional employees." S.Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). There is *no* mention of Section 2(12) acting as a restraint of any kind on the definition of "supervisor." The separate definition of "professional employees" was clearly intended to provide such employees with the opportunity to be grouped into their *own bargaining units, separate* from non-professional employees. 29 U.S.C. 159(b)(1).



The Senate Report states that "the committee was careful in framing a definition to cover only *strictly* professional groups such as engineers, chemists, scientists, architects, and nurses." S.Rep. No. 105, 80th Cong., 1st Sess. 19 (1947) (emphasis added).[19]

### 2. This Court Never Approved The "Patient Care Proviso" Test Asserted By The NLRB

The Board incorrectly argues today that a footnote in an opinion of this Court concerning university faculty members gives the Court's *imprimatur* to the Board's "patient care" test. In *Yeshiva, supra*, this Court held that "[t]he Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage [of the Act]." 444 U.S. at 690. In an accompanying footnote, this Court cited five Board cases (including *Doctors' Hospital of Modesto, Inc., supra*), each involving "lead men" or "straw bosses", who *failed to meet the Section 2(11) criteria*.[20] The Court then stated that "in the health care context" this is "a test Congress expressly approved in 1974." 444 U.S. at 690, n.30.

*Yeshiva's* approval of the traditional "straw boss" analysis in the context of professional employees cannot remotely be

[19] In the current *Northcrest Nursing Home* case, the Board explains that LPNs are "at least sub-professionals", 313 NLRB No. 54, slip op. at n.10, *citing NLRB v. Res-Care, Inc.*, 705 F.2d at 1466, an admission, at the least, that LPNs are *not* "professionals." In *Park Manor Care Center Inc.*, 305 NLRB 872 (1991), the Board clearly distinguished LPNs as "technical" and not professional employees. The Board slurs together the "professional" RNs and the "technical" LPNs by the glib conclusion that they both utilize "independent judgment." *Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at 2. The Board decided to treat non-professionals as though they *were* professionals — for purposes of union eligibility, at least. *Id.* at n.10. There is no statutory support for such action.

[20] The Court cited *General Dynamics Corp.*, 213 NLRB 851 (1974)(project leaders akin to "leadmen"); *Wurster, Bernardi, & Emmons, Inc.*, 192 NLRB 1049 (1971) (architects working on finite projects); *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971)(project managers and job captains working on specific assignments); *National Broadcasting Co.*, 160 NLRB 1440 (1966) (broadcast newswriters only have writing authority).

construed as approving the Board's higher threshold test, *see Beverly Manor II*, *supra*, which the Board denied even existed until 1982.

### G. The ANA, Today And In 1974, Asserted Arguments Which Are Irrelevant To The Nursing Home Industry

The ANA makes repeated assertions about the plight of registered nurses in hospitals. This case does not involve registered nurses or hospitals. It concerns LPNs in a nursing home, like many of the thousands of homes operated by AHCA members.

Hospitals and nursing homes do not function in the same manner. At the Home in the case below, there are up to 11 nurses (RN and/or LPN) in the nursing department, and as many as 55 nurses' aides. In a hospital, there are usually many more *nurses* than there are aides. Supervision in a hospital is provided by various strata of nurses above the level of the rank-and-file nurse. On an organization chart, the nurse in a hospital might be the equivalent of the aide in a nursing home. By contrast, in a nursing home like the one at bar, the nurses provide a necessary – often the *only* – level of supervision available.[21]

The ANA argues that if the Sixth Circuit is correct, virtually all registered nurses in hospitals and other health care facilities would be covered by Section 2(11). ANA Brief at 3. This is incorrect. The response to this contention is the same as was given by Congress in 1974: the issue should be decided on a *case-by-case basis*, in light of the clear statutory mandate that is applied without fanfare in *every other industry*.

In sum, the ANA simply has never stopped lobbying for the proposed amendment to the Act that Congress declined in 1974

[21] The Board has taken pains to express the clear difference between hospitals and nursing homes, in terms of the services rendered, the patients served, staffing patterns, and organization. *Park Manor Care Center*, 305 NLRB at 874-876.



and the Board has since resurrected. Indeed, the ANA now asks this Court to judicially "enact" what it could not persuade Congress to legislate in 1974. Such action should be left to Congress.[22]

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[22] The gravamen of the Brief of *amicus* AFL-CIO is that the Board was compelled by the legislative history of the Act to apply Section 2(11) in a manner consonant with the "straw boss" standard. We could not agree more. Unfortunately, for the reasons discussed above, that is *not* what the Board has done.

The AFL-CIO also asserts that "there is no formulaic answer to the question whether or not particular individuals are supervisors based on the direction of employees." AFL-CIO Brief at 28. The AHCA again agrees completely. However, the Board's approach to the nurse supervisor issue has resulted in a formulaic exclusion from the ambit of Section 2(11).

## QUESTION PRESENTED

Whether this Court will permit the Board to create a extra-statutory exclusion to the Act's definition of "supervisor" for health care professionals without any textual support in the Act or in the settled principles applying section 2(11) statutory criteria to all employers subject to the Act.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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**No. 92-1964**

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF U.S. HOME CARE CORPORATION OF HARTSDALE, NEW YORK, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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### RULE 29.1 STATEMENT

*Amicus Curiae* U.S. Home Care Corporation is a publicly owned corporation. It has no parent company. Its subsidiary companies are identified as "U.S. Home Care" companies in each state of operation except New York where its subsidiary is "Affiliated Home Care of Westchester, Inc."

## CONSENT TO FILING

This brief *amicus curiae* is filed pursuant to Supreme Court Rule 37.2 with the written consent of all parties. The letters of consent are filed with the Clerk of the Court.

## INTEREST OF AMICUS

1. U.S. Home Care Company ("USHO") *amicus* is a leading nation-wide provider of integrated home health care services. Beginning in 1974 as a para professional organization specializing in home care aides in Westchester County, New York. USHO now serves over 48 million people in 11 major markets: Long Island, Metropolitan, and Upper Hudson Valley/ Albany, New York; Bridgeport, Hartford, New Haven, and Wallingford, Connecticut; Philadelphia and Pittsburgh, Pennsylvania; Detroit, Michigan; Baltimore, Maryland; Atlanta, Georgia; Los Angeles, California; and West Palm Beach, Port St. Lucie, Miami, and Fort Lauderdale, Florida.

2. USHO maintains its principle office and place of business at 141 South Central Avenue, Hartsdale, New York. USHO operates 26 locations in the markets noted above and employs approximately 3,500 health care professionals and para professionals as I.V. Certified, Registered Nurses, Registered Nurses, Licensed Practical Nurses, Home Health Aides, Personal Care Aides, Homemakers' Companions, Physical Therapists, Speech Therapists, and Occupational Therapists. During November, 1993, these health care professionals and para professionals provided quality care to 4,500 patients through 18,000 visits and 300,000 hours of service to patients in their homes. Because USHO has gross annual revenues in excess



of $100,000.00 annually, and receives goods valued at over $50,000.00 from points outside the state of New York, USHO is an employer engaged in commerce within the meaning of the National Labor Relations Act, 29 U.S.C. §152(2).

3. The Court's decision in this case will directly affect the quality of health care to nursing home patients and also to the increasing number of patients receiving care in their homes. In both in-patient and home care services, the interest of health care providers is identical: to maintain and develop the kinds of quality, affordable patient care likely to attract and retain patients. At USHO, the primary consideration is to care for the needs of each individual patient through qualified and committed caregivers. The chartered corporate goal is to improve the way we as care providers and as a society respond to the acutely and chronically ill, aged, and disabled.

4. USHO is the only party or *amicus* herein to present to the Court the unique perspectives of home health care providers and their patients. In the case of geographically dispersed home based patient care, the professional nurses who direct and evaluate the patient care provided by para professionals provide the only direction and monitoring of the quality of care at the patient's bedside. The Court's apparent decision to postpone a ruling in *Visiting Homemaker & House Services, Inc.* v. *NLRB* (No. 92-1799) (*certiorari* pending), a case directly involving a home health care provider, highlights the importance of the instant case because the outcome here may control the outcome in *Visiting Homemaker*.

## STATEMENT OF THE CASE

### A. Home Health Care

For more than 100 years home health care services in the United States have been provided by visiting nurses who substituted for busy medical doctors unable to make demanding and frequent house calls to terminally ill patients.[1] By 1963, the number of visiting nurses associations and home care aide organizations had reached 1,100.[2] In 1965, the enactment of Medicare provided federal payments for skilled nursing and curative therapy for patients over 65 years of age and disabled patients of any age. By 1993, this benefit increased the number of certified home health "agencies" to nearly 7,000.[3] Another 7,000 providers service patients in their homes as non-certified agencies because they provide only non-reimbursable Medicare services, or provide no skilled nursing care, or care for private-pay patients. Today, nearly 14,000 providers now deliver home care to approximately six million individuals suffering from

[1] Griffith, *The Home Health Agency: Past Present & Future, Caring*, Aug. '86, 12; *Basic Statistics About Home Care 1993, National Association for Home Care*, 1 (hereinafter "*Basic Statistics*").

[2] *Basic Statistics* at 1.

[3] Source: *HCFA, Office of Survey and Certification*. The term home health "agencies" includes, visiting nurses associations, combined government and voluntary agencies, state, county, city, and other local government-run agencies, proprietary for-profit companies, private non-profit companies, hospital-based agencies, skilled nursing facilities, and rehabilitation facilities. Less than 30% of the certified "agencies" are proprietary. In 1993, less than 8% of Medicare benefit payments were for care provided by home health agencies. *Basic Statistics* at 3.



acute illness, long-term conditions, permanent disability, or terminal illness with a variety of professionals, para professionals, and allied service personnel.[4]

Despite annual patient share growth rates estimated at 10% between 1986 and 1991 and 12% since 1991, home care remains only 3% of the national health care expenditures now in excess of $800 billion.[5] Thus, while the number of home care recipients has increased annually home health care is more cost effective than similar care provided in hospitals and nursing homes. For example, in 1993, home health charges per visit was $78.00, while skilled nursing facilities charges were $263.00 per day, and hospital charges were $1,514.00 per day.[6] In addition, significant cost savings are achieved whenever a patient is moved from institutional settings into their own homes.[7]

Several factors and trends project accelerated growth for home care providers. Our aging population is expanding: one out of every six (6) persons will be over the age of 65 by the year 2000.[8] As health care moves from being hospital centered into HMOs and community walk-in emergency centers, patient access to and the need for home care services will also increase. This population will include steadily expanding

[4] *Basic Statistics* at 1.

[5] Source: Office of National Health Statistics.

[6] *Basic Statistics* at 8.

[7] The average expense per home care visit rose only $17.00, from 1987 to 1993, from $49.00 to $66. *Basic Statistics* at 3.

[8] *Caring, supra*, note 1 at 14-15.

percentages of chronically ill or disabled persons who have survived life-threatening illnesses. Patients with cancer, arthritis, diabetes, heart and chronic pulmonary diseases, and Alzheimers can maintain their dignity and independence in their homes surrounded by supporting family, friends, and familiar surroundings. The rapid advances in portable technological devices enable home care providers to deliver complex care involving parenteinal nutrition, enteral feedings, respiratory/venilator care, antibiotic and other forms of intravenous therapy.[9] As technological developments allow more complicated procedures to be safely performed in the home the responsibilities of those professional nurses who direct and evaluate the home care delivered by aides and companions will increase. As specialized long-term services expand, these nurses will direct subordinates in the delivery of patient care programs with a greater complexity and variety of curative needs than is presently the case.

The most significant factor in the projected growth of patients receiving home care is overwhelming evidence of patient preference. A recent poll conducted by the American Association of Retired Persons showed that 85% of those middle age and older Americans responding prefer the receipt of health services in their homes rather than in nursing homes, clinics, or hospitals.[10] This preference is based upon the knowledge that home care is quality care delivered where patients can be in charge of their own recovery and treatments.

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[9] *Id.* at 13.

[10] Straw, *Attitudes & Knowledge: Middle Age & Older Americans on Home Care, Caring*, March, 1992 at 78.



Public confidence in the quality care now provided and in the assurance of that quality in the future is undermined by the promulgation and acceptance of legal dogma like the Board's "mere patient care" rule that are based upon the unsupportable theory that only home health care professionals have an "interest" in the quality of home care provided.

**B. The Public Interest in Patient Care**

Home health care providers are pervasively regulated by federal, state, and local governments because of the paramount public interest in establishing and maintaining reliable and professionally competent health care. These statutes and regulations require quality health care as a condition of operation. Therefore, compliance with these requirements mandates that each home care provider's primary interest is in the quality of patient care delivered.

As the New York legislature stated: "the provision of high quality home care services to the residents of New York state is a priority concern."[11] The Maryland legislature has declared: "the purpose of home health care is (1) to avoid institutionalization, (2) to shorten hospital stays, (3) to speed recovery, and (4) to bridge the gap in community health services for patients who could not get adequate health care."[12] Pennsylvania's licensing requirements and other regulations have been enacted "to assure quality care

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[11] Public Health Law §3600 (*McKinney's Consolidated Laws of New York*, Annotated, 1993).

[12] Annotated Code of Maryland §19-402 (1993).

deliveries in [home health care] facilities."[13] These and other states, provide for professional nurse direction and evaluation of the health care provided by home health aides.[14] Federal requirements imposed by Medicare upon certified home health providers mandate that "part-time or intermittent services of a home health aide" are to be provided "under the supervision of a registered professional nurse."[15] These supervisory requirements assure patients and their concerned families that they will not be mistreated or attended by unqualified professionals or non-professional care givers. Only home care providers who share with their care givers the mutual interest to maintain and exceed these requirements are entrusted with the responsibility for protecting these federal

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[13] 35 P.S. §448.806(f) (Purdon's Statutes, 1993). *Accord*: West's F.S.A. (1993) §400.461(2) ("...to provide for the development, establishment, and enforcement of basic standards which will insure the safe and adequate care of persons receiving health services in their own home.").

[14] *E.g.*, Pennsylvania Administrative Code Sections 601.32(b), 601.35(c) (registered nurse "shall...supervise and teach other nursing personnel" including home health aides); Connecticut Department of Health Service Licensure Regulations §19-13-D69(4)(B) ("primary care nurse...is responsible for supervision of the services rendered to the patient and family by the homemaker-home health aide."); Florida Administrative Code, *Minimum Standards for Home Health Agencies*, Ch. 10D68.002(5) ("Home Health Aide is a person who provides personal health care services...under the supervision of a licensed health care professional..."); Public Health Law §3602.4 and .5 (*McKinney's Consolidated Laws of New York Annotated 1993*) ("Home health aide services" and "Personal care services" are to be "supervised by a registered professional nurse...").

[15] 42 U.S.C. §1395x(m)(1) and (4) (1993).



and state interests in quality (not as the Board has described it "mere") patient care.

**C. Patient Care at USHO**

Each USHO Branch Office is managed by a Director. In addition, each Branch Office employs a Director of Nursing who is in charge of clinical services. Each Branch Office also employs registered nurses (R.N.'s) as Field Supervisors who report to the Director of Nursing and who supervise patient care for a specific geographic area within the Branch Office.

The particular clinical services needed are determined in accordance with the orders of the patients' doctor(s). The R. N. Field Supervisor develops and implements the patient care plan, and, where no skilled nursing care is necessary, but para professional services are, supervises and directs the care given by the Home Health Aide and/or Personal Care Aides and/or Homemaker/Companion, and submits written evaluations of their work performance on an annual basis to insure that aides "are providing safe, high quality care to clients."[16] These evaluations determine whether these para professionals continue their employment with USHO. In addition, the R.N. Field Supervisor is responsible for compliance by all para professionals with USHO personnel policies and exercises this reprimand responsibility by unilaterally sending aides home, reassigning aides to different patients, limiting the type of patient the aide may attend, and effectively recommending other forms of discipline wherever violations of these USHO policies occur. The R.N. Field Supervisor is the only repre-

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[16] *USHO Policy Manual*, Section 4.17 Supervision (1990).

sentative of USHO to direct and evaluate subordinate patient care at the homesite.

Where both skilled nursing services and para professional services are required by a patient, the foregoing responsibilities are exercised by Primary Care Nurses who are in charge of directing the care of each para professional assigned to the patient. Primary Care Nurses having these responsibilities report directly to the Director of Nursing. In these circumstances, the Primary Care Nurse is the only representative of USHO to direct and evaluate the patient care at the homesite. In some Branch Offices, Primary Care Nurses provided skilled nursing services, directly to patients in homes where no para professionals are assigned. In these cases, they exercise no supervisory or performance evaluation functions of para professionals.

In *Visiting Homemaker & House Services, Inc.*, 305 NLRB No. 90 (1992) (unreported) (reprinted No. 92-1799, Appendix A-16-A-19) (*certiorari pending*), the Board held that House Services full-time and regular part-time registered nurses who performed similar direction and evaluation functions of subordinates in patient's homes as those set forth above, were statutory "employees" under its notions about "mere patient care." This section 2(11) exclusion for health care supervisors is the same Board rule rejected by the decision below in the nursing home field.

## SUMMARY OF ARGUMENT

1. The Board's notion that health care professionals who responsibly direct and evaluate others in "mere patient care" are not statutory "supervisors" within the literal language of section 2(11) of the Act was,



with good reason, rejected by the Court of Appeals. In 1947 Congress enacted a supervisory exclusion that does not differentiate among supervisors on the basis of their profession or occupation. Congress declined to enact any exemptions or exclusions for any group of professionals including professional nurses on the basis the Board proposes here.

2. The question presented for decision by this Court is answered by first reading the statutory elements of supervisory status in section 2(11), and second by applying these elements to the health care field as they would be applied to any other field covered by the Act. Nothing in the Act distinguishes health care supervisors from other supervisors. Universal application preserves for health care employers the same undivided loyalty from those who responsibly direct and evaluate the performance of subordinates that section 2(11), properly understood, confers upon all employers subject to the Act.

3. The Court of Appeals faithfully adhered to the Act as written by recognizing that those who responsibly direct and evaluate subordinates to accomplish their employers' business purpose are, under section 2(11) and long settled principles applied by the Board in other cases, statutory "supervisors." The Court of Appeals then properly overruled the Board by concluding that since "patient care" is the mission of heath care providers, those professional nurses who responsibly direct and evaluate subordinates in the performance of this mission are in law and fact "supervisors."

4. The decision below fully effectuates the Congressional purposes that led to the enactment of section 2(11) and the inclusion of professional nurses within

the Act's jurisdiction in section 2(12). The line drawn by the Court of Appeals preserves to the health care employer the undivided loyalty of those professional nurses who responsibly direct and evaluate subordinates in the delivery of the employers' mission: patient care. The decision below concurrently preserves to professional nurses who perform direct patient care or who demonstrate patient care techniques to subordinates the option of collective representation.

5. There is no source in the Act for the Board's sweeping exclusion from section 2(11) of all nurses whose direction of subordinates someone might label as "incidental" to "mere patient care." By misrepresenting the "uniformity" of its pre-1974 health care decisions, the Board uses inaccurate history to create a self-fulfilling prophesy. The Board then seizes upon 1974 Committee Reports and claims "authorization" for its present rule. This form of boot strapping does not constitute even Congressional Committee much less Congressional approval of the Board's present rule that was unannounced until after 1974. The Board has no roving commission to ignore what Congress did and instead adopt what it did not do.

6. This is not a factual dispute or a case where essential principles embodied in the Act are unaffected. Instead, the Board has concocted a statutory definition of "supervisor" which exempts nearly all professional nurses from supervisory status. No amount of "expertise" can save the Board's *ipse dixit*, without a source in the Act, that the responsible direction and evaluation of patient care by subordinates at the patient's bedside is *not* "in the employers interest" within the well-settled meaning of section 2(11).



## ARGUMENT

### I. THE COURT OF APPEALS APPLIED SECTION 2(11) AS ENACTED IN OVERRULING THE BOARD

Section 2(11) of the Act, unaltered since its enactment in 1947, defines the term "supervisor" as:

> "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, *or* responsibly to direct them, or to adjust their grievances, *or* effectively to recommend such action, if in connection with the foregoing the exercise of such authority. . .requires the use of independent judgement."(emphasis supplied).

Section 2(3) excludes "any person employed as a supervisor" from the definition of the term "employee." This statutory exclusion from the Act's coverage is written broadly. By its express terms section 2(11) excludes all "supervisors" including "professionals" as defined in section 2(12)[17] employed by any employer regardless of the business purpose of any employer subject to the Act's jurisdiction. Indeed, Congress in 1947 deliberately enacted provisions containing one statutory "supervisory" definition and provided no exemption from section 2(11) even for the construction, communication, printing, newspaper,

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[17] Section 2(12) provides in relevant part: the term "professional employee means—(a) any employee engaged in work. . .(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in. . .a hospital. . . ."

mining and maritime industries where foremen were already union members.[18]

Congress specified that the same statutory exclusion would apply uniformly to all employers whose volume of business met the Act's jurisdictional standards. As required by separation of powers principles, the Court below necessarily applied this unitary statutory supervisory exclusion to the health care field as actually enacted by Congress. *Connecticut Nat. Bank v. Germain*, ___ U.S. ___ , 112 S.Ct. 1146, 1149-50 (1992) (the first cardinal canon is that courts must presume that the legislature says in a statute what it means). See also *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S.189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose".).

## II. THE COURT OF APPEALS APPLIED WELL SETTLED PRINCIPLES IN CONCLUDING THAT NURSES WHO DIRECT AND EVALUATE THE PATIENT CARE PROVIDED BY SUBORDINATES ARE ACTING "IN THE INTEREST" OF THEIR HEALTH CARE EMPLOYER WITHIN SECTION 2(11) AS WRITTEN BY CONGRESS

There is no dispute that Congress' use of the disjunctive "or" in section 2(11) means that the exercise or possession of any one of the enumerated powers, including "responsibly to direct" others and to effec-

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[18] Leiter, *The Foreman in Industrial Relations*, 51-81 (Columbia, 1948). *See also How Collective Bargaining Works 67* (The Twentieth Century Fund New York, 1942) (newspaper industry feared loss of loyalty of unionized foremen disciplined by their union for taking management's side in contract interpretation disputes).



tively evaluate their performance "in the interest of the employer," establishes a statutory "supervisor" as a matter of law.

It is also common ground that the 1947 Taft-Hartley Amendments underscored Congress' propelling intention to preserve for the employer the undivided loyalty of those who are assigned the responsibility to keep employees at their work, to see to it that they perform well, and to correct them when they are at fault. H.R. Rep. No. 245, 80th Cong., 1st Sess. 16 (1947) (H.R. 3020). *See also* S. Rep. No. 105 80th Cong., 1st Sess.(1947) ("unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen"); 93 Cong. Rec. 3952 (1947) (remarks of Sen. Taft) ("it is impossible to manage the plant unless the foremen are wholly loyal to the management."). Accord: *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980) ("an employer is entitled to the undivided loyalty of its representatives"); *Florida Power and Light Co. v. International Brotherhood of Electrical Workers*, Local 641, 417 U.S. 790, 806 (1974). As Professor Cox has noted, even psychological alliance with a union undermines the foremen's loyalty to management and places them in an untenable position of conflict of interest. Cox, *Some Aspects of the Labor Management Relations Act*, 61 Harv. L. Rev 1, 5 (1947).

Congress did not separately define the section 2(11) phrases "in the interest of the employer" or "responsibly to direct". The Court below has recognized in one of the earliest cases considering the 1947 Taft-Hartley Amendments that the statutory definition includes those individuals responsible for insuring that subordinates maintain the quality and safety stand-

ards their employers have set for products or services. *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir.), cert. denied, 338 U.S. 899 (1949). The Court noted that the phrase "responsibly to direct" means: "To be responsible is to be answerable for the discharge of a duty or obligation. Responsibility includes judgement, skill, ability, capacity, and integrity, and is implied by power." *Id.*[19]

The Board itself has recognized in the industrial setting that "leadmen" who oversee other employees "as well as checking on quality" are responsibly directing others in the interest of their employer and therefore are statutory "supervisors." *Mathews & Co.v. NLRB*, 354 F.2d 432, 435 (8th Cir. 1965), cert. denied, 384 U.S. 1002 (1966), *enfg.*, 149 NLRB 161 (1964). Both delegated responsibilities require the delegated power, judgement, and integrity that define a statutory "supervisor". The Court of Appeals here simply applied these same settled principles to nursing homes as the language of section 2(11) requires.

In the very first case asserting its jurisdiction over proprietary nursing homes, the Board applied traditional section 2(11) principles to professional nurses. In *University Nursing Home, Inc.*, 168 NLRB 263, 265 (1967), the full five member Board (Chairman McCullock, Members Fanning, Jenkins, Zagoria, and Brown) concluded that a LPN "charge" nurse supervising the work of three nursing aides and one orderly

[19] At least three federal circuit courts of appeals have adopted this standard. *Maine Yankee Atomic, etc. v. NLRB*, 624 F.2d 347, 361 (1st Cir. 1980); *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981); *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 (9th Cir. 1971).



in changing bed linens, and bathing, feeding, massaging, and "otherwise caring for patients" in accordance with physicians instructions was a statutory "supervisor" within the meaning of section of section 2(11). This reliance upon the direction of the delivery of patient care by subordinates as falling well within the statutory phrases "responsibly to direct. . .in the interest of the [University Nursing Home]" applied settled section 2(11) principles and was the sole basis for the Board's decision. The *University Nursing Home, Inc.* holding that the direction of "patient care" provided by subordinates is the exercise of section 2(11) supervisory duties has never been expressly or impliedly overruled by the Board or the federal courts.[20]

The Board has also long recognized in the industrial setting that foremen who evaluate the performance of subordinates and whose evaluations are accorded "substantial weight" by their superiors in decisions that affect tenure and job assignments are statutory "supervisors." *General Telephone Co. of Michigan*, 112 NLRB 46 (1955). This principle has been upheld as the single indicia of "responsibly to direct. . .in the interest of the employer". *Id.* at 112 NLRB at 49

[20] The Board claims *Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950 (1970) (Members Fanning, McCullock, and Jenkins), 489 F.2d 772 (9th Cir. 1973) is the "seminal" decision announcing its "mere patient care" exclusion. If so, this reversal of policy made no mention of the earlier and conflicting *University Nursing Home*, decided by the very same Board members. This unexplained reversal ignores the duty of the Board to offer reasons for disregarding its own precedents. *Oil, Chemical & Atomic Workers v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986) (failure to explain or even cite prior case warranted reversal of Board order).

n.17 (foremen are statutory "supervisors" even though they have no authority to hire, discharge, assign, promote, or discipline employees). *See also Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir.1964) (if *some* discipline is meted out on foremen's recommendation, the occasional recommendation is "effective" within the scope of section 2(11) and the foreman is a statutory "supervisor"); *NLRB v. Southern Airways Co.*, 290 F.2d 519, 524 (5th Cir. 1961) (superior's "consideration" of foreman's recommendation sufficient to make foreman a statutory "supervisory"). The Board has also applied this analysis to find that professional nurses who prepare performance evaluations on subordinates are statutory "supervisors". *Rockville Nursing Center*, 193 NLRB 959, 962 (1971).

The foregoing decisions demonstrate that those individuals who are charged with the responsibility to direct subordinates and evaluate the quality of their work at the job site have until recently been considered by the Board and the federal courts of appeals to be statutory "supervisors" whose undivided loyalty belongs to the employer. The Court below properly applied these precedents to the health care field.

Remarkably, the Board does not claim these supervisory responsibilities exercised by nurses are unimportant, or that their possession or exercise does not normally fall within the accepted and well settled principles defining a statutory "supervisor." Rather, the Board devalues any exercise of accepted supervisory responsibilities by professional nurses that relate in some way to the manner and means by which subordinates deliver "mere patient care." This broad extra-statutory rule rests on two contradictory "policy" assumptions. The first is that a health care provider qua employer does not have a statutory "interest" recognized by section 2(11) in the oversight of professional health care services on the theory that only the health care professionals and *not* their employer are concerned with patient care. In conflict is the hypothesis that the "interest" of the health care provider qua employer and of the professional nurses who supervise and evaluate patient care is identical as to the maintenance of professional standards so there can never be undivided loyalty at the patient's bedside. Neither of these propositions as Judge Friendly said in a different context: "is. . .,to say the least, of the sort that commands instant assent." *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986). Standing together as they do under the Board's decision here, the result is not only counter-intuitive but irrational.



The Court below and the Board itself recognize the operative reality that all health care providers as employers are vitally interested in the oversight and direction of patient care because: "Patient care (or 'mere patient care,' in the Board's phraseology) is the business of a nursing home." *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1079 (6th Cir. 1987). Accord: *St.John's Hospital & School of Nursing*, 222 NLRB 1150 at 1150 (1976) ("the primary function of a hospital is patient care"), modified on other grounds, 557 F.2d 1368 (10th Cir. 1977). It is no less true for home care providers than for hospitals and nursing homes that:

> the best interest of the employer [is] to try to do a superior job of serving the needs and

> interests of the employer's customers. . .[and] to provide the type of patient care likely to attract and retain nursing home patients.

*Beverly California Corp. v. NLRB*, 970 Fld. 1548, 1553 (6th Cir. 1992).

The direction and oversight of para professionals by professionals at the home site is essential to the maintenance of quality patient care services. The nurses responsibility is not limited to monitoring the patient care plan schedule or to insuring that the care plan procedures are performed on schedule or as needed. Instead, to paraphrase the words of the House Committee of Education and Labor, they must insure that the care services administered by aides and companions are "done well." H.R. Rep. No. 245, 80th Cong., 1st Sess. 16 (1947). In the health care field, the insistence by professional nurses that subordinates adhere to the employers' quality standards is the difference for health care providers between patient recovery or decline. It is the difference between being a health care provider and being unable to attract patients. And essential to the maintenance of these standards is the health care provider's continuing confidence that the professional nurses will steadfastly require subordinates to adhere to quality and safety patient care standards, and to promptly correct and downgrade in the evaluation system those subordinates who fail to meet these requirements.

It can not be presumed, as the Board does, that unionized professional nurses would *never* be tempted in the direction and evaluation of subordinates to compromise the employers' interest in order to "get right" with either their union or a union representing para professionals. The Board's presumption requires



the health care provider to assume the risk of divided loyalty at the patient's bedside. In 1947, Congress enacted the opposite assumption. *See Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-62 (1973) (dual union-supervisor status that *might* impair loyalty to management motivated Congress in enacting section 2(11) Congress intended to foreclose even psychological alliance with a union. See Cox, 61 Harv. L.Rev. at 5.); *see also* n. 18, *supra*. Insuring the undivided loyalty of these bedside representatives is perhaps the most important delegation "in the employers interest."

This direction and evaluation of subordinates is *not* automated. Indeed, it is precisely because each home health patient has a unique medical history, different symptoms,and distinct physical and psychological needs that the direction of patient care is rarely routine or ministerial. At USHO each para professional, because of limited education and training, relies upon the experience of the professional nurse to direct them in the endless variety of rapidly changing patient care needs because they lack the skill to exercise independent judgment themselves. USHO relies upon the "judgment, skill, ability, capacity, and integrity" of its professional nurses in delegating to them the power to direct subordinates in the same way as non-health care employers. *See Ohio Power*, 176 F.2d at 387. The Board adopted this obvious reality in the provision of patient care in nursing homes in *Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972):

> . . .servicing elderly and sick patients where critical needs may momentarily require variation in standard procedures, the nurse responsible for the supervision of other

> nurses. . .must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely.

There is no logical or factual basis for the Board's sweeping "mere patient care" exclusion from section 2(11) that would deny USHO and other health care providers the undivided loyalty of its only representative at the patient's home. In contrast, the Court of Appeals position faithfully strikes the line set by Congress in Section 2(11). The Court, unlike the Board, accepts the reality that the direction and evaluation of patient care is undertaken not only for compliance with professional standards but also is in the interest of the health care provider whose sole business purpose is patient care. This common sense meaning for the section 2(11) phrase "in the employers interest" is the same as that applied to non health care employers who depend upon the undivided loyalty of those charged with the responsibility to insure the quality of the goods and services that define their employers business mission.

The Court of Appeal's textual application of the supervisory exemption in section 2(11) preserves to the health care provider, as the Congress intended in 1947, the undivided allegiance of those who direct and evaluate how subordinates perform patient care. The decision below fully effectuates this legislative purpose by providing coverage of the Act to those professionals who provide patient care or who assist,but not those who direct and evaluate, para professionals in patient care.[21]

[21] The Seventh Circuit too narrowly defines the statutory exemption by placing determinative reliance upon only two "guiding lights." *See e.g., NLRB v. Res Care, Inc.*, 705 F.2d 1461 (1983). While not irrelevant, limiting the scope of section 2(11) to "proper" ratios of supervisors to employees and to those supervisors who exercise disciplinary authority, deletes without Congressional authorization from section 2(11) all the other disjunctive indicia of supervisory status Congress intended to have full and equal effect. This denies the intent of Congress by allowing the Board's "mere patient care" rule to prevail in those instances where proper application of all the other indicia would preserve to the health care employer the loyalty of his frontline representative precisely as Congress intended.



## III. THE BOARD'S "MERE PATIENT CARE" RULE IS INCONSISTENT WITH THE STATUTE AND IS IRRATIONAL AS APPLIED TO HEALTH CARE PROVIDERS

The Board insists that its unauthorized amendment which exempts from section 2(11) all health care professionals who direct and evaluate subordinates in "mere patient care" has been "expressly approved" by Congress, noted with apparent approval by this Court in *Yeshiva*, and, in any event, is the type of administrative legislating excused by its "expertise." None of these assertions alone or in combination sustains the Board's sweeping "mere patient care" amendment to the Act's supervisory exemption.

In 1974 the 93d Congress *declined* to enact a statutory amendment to section 2(11) urged by the American Nurses Association that would have declared professional nurses to be section 2(3) "employees".[22] Undaunted by this legislative history, the Board nevertheless ascribes Congressional assent to

[22] *Hearings on H.R. 1236 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong.,1st Sess. (1973)(Statement of ANA official Alice L. Ahmuty urging adoption of "specific modification" of section 2(11) "as it relates to registered nurses.").

its "mere patient care" modification that creates the same section 2(11) exemption for professional nurses that Congress failed to enact in 1974. A more persuasive analysis of Congressional rejection of the ANA proposal is that Congress disagreed with the enactment of a separate exclusion for professional nurses either with legislation or by administrative agency "expertise".

The Board, without any supporting statutory language in the Act, purports to find it in Committee Reports.[23] These Reports advised only a continuation of pre-1974 Board precedent; none of which mentioned the broad "mere patient care" exclusion now before this Court. Assuming *arguendo* that the Board is correct that these Committee members were familiar with its pre-1974 health care cases, then these Committee members also knew that this body of cases included well settled principles of "supervisory" status now admitted by the Board as flatly "inconsistent with its blanket "mere patient care" standard. *See, e.g., Beverly Enterprises-Ohio d/b/a North Crest Nursing Home*, 313 NLRB No. 54 (Nov. 26, 1993) (overruling *Avon Convalescent Center, supra*, and *Rockville Nursing Center, supra*); *Beverly Manor Convalescent Centers*, 275 NLRB 943, 946 (1985) (direction and evaluation of subordinates "motivated by patient care needs" is not "supervisory" within section 2(11)). As demonstrated above, and now admitted by the Board in *Beverly Enterprises-Ohio*, pre-1974 administrative decisions included explicit recognition that the preparation of subordinates' evaluations[24] and the direction of health aides in patient care[25] were not only indicia of supervisory status within the scope of section 2(11), but also designated those professional nurses who exercised or possessed these authorities statutory "supervisors". There is no suggestion in the Committee Reports that these decisions or any others were disapproved.

[23] H.R. Rep. No. 1051, 93d Cong. 2d Sess. (1974); S. Rep. No. 766, 93d Cong. 2d Sess. (1974).



Because the present *per se* rule was not found in Board "law" prior to 1974, it could not have been discovered by any member of the 93d Congress. It is both wrong and disingenuous to claim the Congressional Committees, much less the Congress, "approved" what is in fact a post-1974 administrative amendment to section 2(11) that implants a proposed amendment that Congress failed to adopt in 1974. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 (1978) (Statements of Senate and House Appropriations Committee members represent only their individual views and are not reliable evidence that Congress as a whole was aware of a federal agency position that the Tellico Dam project did not violate the Endangered Species Act).

The only reliable assumption, given the fact that Congress made no mention of specific Board health care cases in the Committee Reports, is that the Committee members were unfamiliar with the pre-1974 criteria for determining supervisory nurses in health care cases. Accordingly, the Reports lack any plau-

[24] *See Rockville Nursing Center*, 193 NLRB 959, 962 (1971).

[25] *See Avon Convalescent Center, Inc.*, 200 NLRB 702, 706 (1972); *See also University Nursing Home, Inc.*, 168 NLRB 263, 264 (1967) (cited with apparent *approval* in *Beverly Enterprises-Ohio*, 313 NLRB No. 54 (sl.op. fn. 4).

sible basis for the inference that the Board's present rule or it origins were known and thereby adopted or even approved by the Committees.

Because there is no basis for the Board's assumption about the Committees' familiarity with its pre-1974 health care decisions, the one legitimate legislative fact is that Congress declined to enact a broad exclusion for nurses from section 2(11). *See Mitsugi Nishikawa v. Dulles*, 356 U.S. 129, 135 (1958) (one "clear" indication of legislative intent was House Committee's rejection of proposed statutory amendment). It is also well settled that legislative histories including committee reports that do not result in the enactment of specific statutory language have little weight in divining the intent of Congress. *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 168 (1989); *United States v. American College of Physicians*, 475 U.S. 834, 846-47 (1986) (The Court is "hesitant to rely on that inconclusive legislative history either to supply a provision not enacted by Congress or to define a statutory term enacted by a previous Congress."). The Board has no delegated or inherent authority to create a statutory exclusion Congress has declined to enact.

The Board and its *amici* erroneously insist that this Court's *Yeshiva* decision has prejudged this case by concluding that the "mere patient care" rule was "expressly approved" by Congress in 1974. Actually this Court decided that case without examining the status of the Yeshiva faculty members, not to mention nurses or health care professionals, under section 2(11) of the Act. 444 U.S. at 682. Thus, the propriety of the Board's present interpretation of section 2(11) and its application to health care supervisors were not



considered by the Court as the issue was not presented in *Yeshiva* at all. As noted above, the 1974 Senate Report cited by the Court (444 U.S. at 690 n. 30) cannot by any stretch of logic or imagination endorse the Board's post-1974 per se rule and neither did this Court in *Yeshiva*.

What the Court did consider and reaffirm in *Yeshiva* in evaluating both the Act's managerial and supervisory exclusions is that "an employer is entitled to the undivided loyalty of its representatives." *Id.* Consistent with fundamental separation of powers principles, the Court of Appeals faithfully gave full force and effect to section 2(11) "as written by Congress" (987 F.2d. at 1261) and properly rejected all Board claims of Congressional approval based upon a proposed health care exception for nurses that was not enacted. *Iselin v. United States*, 270 U.S. 245, 250-51 (1926)(the approval of legislative changes not enacted or intended by Congress "transcends the judicial function").

The Board's argument for its "mere patient care" exemption to section 2(11) is thus reduced to its claim of "expertise." This is the same "expertise" invoked in *Yeshiva*. There, this Court rejected the Board's wayward interpretation of the statutory exclusion for "managerial" personnel that conferred statutory "employee" status upon nearly all university and college faculty members. There, as here, the Board sought deference for its rule upon its claim to "expertise." This approach was designed to shield from judicial scrutiny the Board's unsupported, conclusory *ipse dixit* that the interests of the faculty and the university *qua* employer in education are so different and adverse as to uniformly and invariably render faculty

members "employees" rather than "managerial" personnel. This Court dismissed this "distinction," concluding instead that a university and its faculty actually share a common interest in education- the very purpose of a university. 444 U.S. at 686. This Court noted that faculty decisions are part of their university's interests, even assuming potential disagreement, because faculty decisions about tenure and curriculum define the university as an educational institution. *Id.*

This reasoning supports the Court of Appeals discussion in this case, because the direction and critical evaluation of subordinates' delivery of health care is no less in the interest of the health care provider *qua* employer because the nurses' maintenance of quality patient care provided by subordinates defines their employer as a health care provider. USHO relies upon the professional nurses' oversight and direction of the aides, companions, and therapists it employees in the patient's home to secure the common objective: quality patient care.

The Board's drawing of an artificial wedge between the common interests of health care professionals who direct and evaluate others and their health care employers also disregards the uncontrovertible and dominate Federal and state interest in the creation of private sector health care providers dedicated to quality who can consistently deliver high quality, low cost home health care to many Americans (*see infra* pp. 7-9). By ignoring the public expectation that the highest patient care standards will be insisted upon by all certified home health care providers, the Board affronts important public values in maintaining health



care standards and thus forfeits any basis for judicial deference to its claims of "expertise."

The Board's narrow focus on a rule that preserves for nurses' unions the widest possible pool of candidates treats patients and their concerned families "as impersonal categories or classes," mere customers whose interests in recovery are of no consequence. Mr. Justice Blackmun was wary of this same type of tunnel vision in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 508-09 (1978) ("I entertain distinct doubts about whether the Board, in its preoccupation with labor-management problems, has properly sensed and appreciated the true hospital operation and its atmosphere and the institution's purpose and needs.") (concurring opinion). This same "preoccupation" has infected the Board myopic vision of the actual delivery of patient care by nursing homes and home health care providers. The Board's irrational and misconceived "mere patient care" amendment to section 2(11) is capricious as a matter of law.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court of Appeals correctly set aside the "mere patient care" exclusion as contrary to the Act and as lacking any rational support in law, logic, or experience.

Respectfully submitted,

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